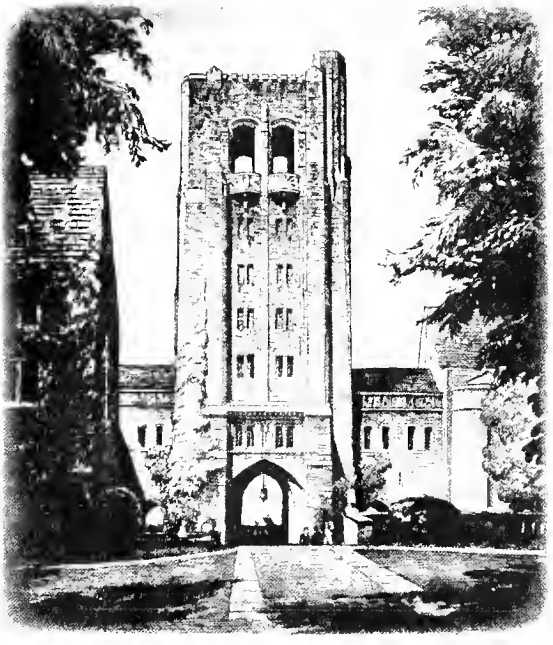
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REGISTRATION OF TITLE TO LAND THROUGHOUT THE EMPIRE

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BOOKS BY THE SAME AUTHOR

The Australian Torrens System.

Ownership and Incumbrance of Registered Land.

Precedents for Transactions with Registered Land.

Conveyancing and Property Law in New South Wales.

Conveyancing Precedents for New South Wales.

Deed Registration in Australasia.

Insurance Law in Australasia.

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REGISTRATION OF TITLE TO LAND THROUGHOUT THE EMPIRE:

A TREATISE ON THE LAW RELATING TO WARRANTY OF TITLE TO LAND BY REGISTRATION AND TRANSACTIONS WITH REGISTERED LAND IN AUSTRALIA, NEW ZEALAND, CANADA, ENGLAND, IRELAND, WEST INDIES, MALAYA, &c.

A Sequel to "The Australian Torrens System."

BY

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PREFACE

This book treats registration of title throughout the Empire as my "Australian Torrens System" treated registration of title in Australasia—that it, it is an attempt to deal with the subject as a whole and point out likenesses and differences in the various separate systems.

Since the "Australian Torrens System" was published (in 1905), registration of title has made fair progress, though intensively rather than in extent of area. The only areas to which it has been newly extended since then seem to be the protectorates of East Africa and Uganda. The greatest intensive growth has taken place in Canada—particularly Manitoba, Saskatchewan and Alberta. There the "Torrens System" is embodied in a mass of statute and case law that promises to equal in bulk the mass of Australasian registration law. Both statute and case law are still growing—rapidly in Canada and more slowly in Australasia. In Australasia there has been little really new legislation since 1905, though the registration statutes have been consolidated afresh in Victoria and New Zealand, and consolidations have also been enacted in Fiji and Papua. Some important cases have, however, been decided in the Australian Courts, such as *Fink* v. *Robertson* (4 C. L. R. 864), *Barry* v. *Heider* (19 C. L. R. 197), and *West* v. *Read* (13 S. R. (N.S.W.) 575.) As to other parts of the Empire, in the Federated Malay States the statutes have been consolidated and important cases decided in the local courts and on appeal to the Privy Council.

Mr. Thom's "Canadian Torrens System" (published in 1912) has enabled the system, as established in Manitoba, Saskatchewan, Alberta, and North-West Territories, to be compared with the Australian system on which it is modelled. Since 1912 the registration statutes in Manitoba and Saskatchewan have been consolidated afresh, and so too in Ontario. Judging by the references to the "Australian Torrens System" in Canadian reported cases my book of 1905 seems to have been found quite as useful in Canada as in Australasia.

Including the eleven Australasian jurisdictions there are not more than thirty-one separate legislative units of the Empire in which a system of registration of title (as defined and treated of in this book) is in operation. Thus, in about fifty jurisdictions

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there is no system of registration of title. Omitting India, however, and omitting those parts of the Empire—such as Scotland, Quebec, and South Africa—where the local jurisprudence is based on the civil law and not the English common law, it will be found that the jurisdictions in which registration of title has not yet been set up are not of the first importance either juridically or commercially. Of the totality of the British dominions subject to English (as distinguished from the civil or foreign) law, the largest and most important half has adopted some system of registration of title to land. Among the jurisdictions referred to in this book the Federated Malay States and Ceylon only—with the possible addition of East Africa, Uganda and Sudan—can be said to have a basis of jurisprudence other than the English common law, and even in these cases the rules of the common law and of English equity have been largely introduced by statutory enactment.

The present book aims at supplementing the "Australian Torrens System" by referring to statutes and cases enacted and decided since 1905, as well as giving a comparative view of all systems of registration of title in England, Ireland, and the oversea dominions. The relative merits of the two main types of registration of title, as they stand to-day—the Australian and the English—can thus be compared. It is of some importance at the present time that the best system should be brought to the front, since registration of title is likely to be an economic factor in schemes of land settlement in all parts of the Empire.

Among the cases cited will be found a few ("unreported") from Jamaica. For most of these I am indebted to the Registrar in Jamaica, who has been good enough to send me MS. copies of the judgments.

JAMES EDWARD HOGG.

6, New Square,
Lincoln's Inn,
London, November, 1919.

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Wasson *v.* Harker, 252, 275.
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Weidman *v.* McClary Manuf. Co., 361, 363.
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Western Trust Co. *v.* Olson, 162.
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White, *in re*, 100.
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Winter, *in re*, 65.
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Wright, *re* (2 Nich. & St.), 82, 83.
Wright, *in re* (12 N.Z.R.), 214.

Y.

Yah Leng Hin *v.* Khoo Poh Ghin, 87.
Yio Then Sang *v.* Cheng Sing, 91, 121.
Yockney *v.* Thompson, 186, 207, 287, 289.
Yorkshire Guarantee Corp. *v.* Edmonds, 115, 363.

Z.

Zachariah *v.* Morrow, 78, 83, 121, 127, 128, 131.
Zock *v.* Clayton, 130, 133.

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ABBREVIATIONS

Al. 1906	means	The Alberta Registration Statute — Land Titles Act (1906).
Aust. Torr. Syst. ...	"	Hogg's Australian Torrens System (1905).
Badg. Dig.	"	Digest of Cases in Badger's Land Transfer Laws of Australasia (New Zealand, 1888).
Br. & Sh.	"	Brickdale & Sheldon's Land Transfer Acts (2nd Ed. 1905).
B. C. 1911	"	The British Columbia registration statute —Land Registry Act (1911).
B. H. 1914	"	The British Honduras registration statute —Land Titles Registry Act (1914).
Bro. & Gl.		Browning & Glover's Registration of Title in Ireland (2nd Ed. 1912).
Can. 1906	"	The North-West Territories registration statute (Dominion of Canada)—Land Titles Act (1906).
Can. Torr. Syst. ...	"	Thom's Canadian Torrens System (1912).
C. L. R.	"	Commonwealth Law Reports (High Court of Australia).
Conv. Prec.	"	Hogg's Conveyancing Precedents for New South Wales, &c., (1901).
Conv. & Prop. L....	"	Hogg's Conveyancing and Property Law in New South Wales (1909).
Eng. 1875, 1897.....	"	The English registration statutes — Land Transfer Act 1875, Land Transfer Act 1897.
Eng. 1903—8 Rules..	"	The English Land Transfer Rules of 1903, 1907, and 1908.
F. M. S 1911.....	"	The Federated Malay States registration statute—Registration of Title Enactment 1911.
Fi. 1876 (1906).....	"	The Fiji registration statute—Real Property Ordinance 1876 (Edition of 1906).
Hutch.	"	Hutchen's Land Transfer Act 1908 (New Zealand).
I. 1891	"	The Irish registration statute—Local Registration of Title (Ireland) Act, 1891.
I. 1910. O.	"	The Irish Registration of Title Orders and Rules of 1910.
Innes F.M.S. *or* Innes	"	Innes' Registration of Title in the Federated Malay States (1913).
J. 1888	"	The Jamaica registration statute—Registration of Titles Law 1888.
L. Is. 1886 (1914)...	"	The Leeward Islands registration statute—Title by Registration Act 1886 (1914 Revision).
M. 1913	"	The Manitoba registration statute — Real Property Act (1913).
Man. R.	"	Manitoba Law Reports.
N.S.W. 1900	"	The New South Wales registration statute—Real Property Act 1900.
N.Z. 1915	"	The New Zealand registration statute—Land Transfer Act 1915.
Nich. & Stops	"	Nicholls & Stops' Tasmanian Law Reports (2 vols. 1897-1904).
On. 1914	"	The Ontario registration statute — Land Titles Act (1914).
Own. & Inc.	"	Hogg's Ownership and Incumbrance of Registered Land (1906).

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P. 1913	means	The Papua registration statute—Real Property Ordinance 1913.
Prec. Reg. Land ...	"	Hogg's Precedents for Registered Land (1907).
Q. 1861, 1877	"	The Queensland registration statutes—Real Property Act, 1861, Real Property Act 1877.
Sas. 1917	"	The Saskatchewan registration statute—Land Titles Act 1917.
S.A. 1886	"	The South Australian registration statute—Real Property Act 1886.
Tas. 1862, 1863, 1886, &c.	"	The Tasmanian registration statutes—Real Property Act (1862, &c.).
Tas. R.	"	Tasmanian Law Reports (from 1905).
Tr. 1902	"	The Trinidad and Tobago registration statute—Real Property Ordinance (1902).
Tr. & Tob.	"	Judgments of the Supreme Court of Trinidad and Tobago.
Trinidad-Tobago ...	"	Trinidad and Tobago (to save the recurrence of "and").
V. 1915	"	The Victorian registration statute—Transfer of Land Act 1915.
W. A. 1893	"	The Western Australian registration statute—Transfer of Land Act 1893.
West. R.	"	Western Law Reporter (Canada).
W. W. R.	"	Western Weekly Reports (Canada).

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ADDENDA. CORRIGENDA.

Page 83.—Protected tenancies (line 4 *et seq.*). A lease for five years, with less than three years to run at the time of initial registration, is not protected as a lease for "three years and under": *First National Invest. Co.* v. *Oddson*, [1919] 3 W. W. R. 591 (Man.).

Pages 102, 183.—*Granby Consol. M. Co.* v. *Esquimault, &c., Ry.* is now reported as *Esquimalt, &c., Ry.* v. *Granby Consol. M. Co.*, [1920] A. C. 172.

Page 185.—The exclusive right of mining in and under the land for 99 years is an interest that can be protected by caveat: *In re Gamboola, &c., Co.* (1919), 19 S. R. (N.S.W.) 227.

Pages 228, 329.—*Hudson's Bay Ins. Co.* v. *Creelman* is now reported as *Creelman* v. *Hudson's Bay Ins. Co.*, [1920] A. C. 194.

Page 260.—*Isman* v. *Sinnott* (note 44), and *Security Trust Co.* v. *Sayre* (note 49), have now been reversed on appeal in the provincial Courts: see [1919] 3 W. W. R. 719. 634. In the former case it has now been held that the remedies of a mortgagee under a third mortgage are not affected by his foreclosing under a first mortgage; in the latter that the purchase of the mortgaged land by the mortgagee has not the effect of foreclosure.

Page 270.—On a verbal lease for one year it is no defence in an action for the rent (defendant not having taken possession) that a mortgagee of the land has not consented to the lease: *Deniher* v. *Fitzgerald* (1919), 19 S. R. (N.S.W.) 260.

Page 308.—The rule in *Flureau* v. *Thornhill* and *Bain* v. *Fothergill* has been applied to registered land in Alberta: *Krezul* v. *Anglo-Canadian Lands*, [1919] 3 W. W. R. 747.

Page 338, note 26.—A lease by mortgagee in possession to the owner of the land was held to have become merged in the mortgagor's own freehold: *Nichol* v. *Pedlar*, [1919] 3 W. W. R. 712 (Sas.).

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SUPPLEMENTAL ADDENDA AND CORRIGENDA.

Owing to the author's residence in London while the book was being printed in Canada, the following additions and corrections could not be inserted in their proper places.

New South Wales.—The Conveyancing Act, 1919 (No. 6), coming into operation 1st July, 1920, repeals and re-enacts some sections of the Real Property Act, 1900, and otherwise relates in some of its provisions to registered land.

South Australia.—The Real Property Act Amendment Act 1919 (No. 1415), amends section 101 of the Act of 1886.

Victoria.—The Transfer of Land Act, 1918 (No. 2966), slightly amends the Act of 1915.

Corrections.

Page 229, line 7, read: "In Manitoba and Alberta."

Page 426. The last line of section 128 should read: "words contained in the fifth schedule."

Page 647. The bracket should be removed from section 49 and placed before section 50.

Page 648. At the end of section 60 read: "save so far as is permitted."

Page 649, line 3 of sub-section 5. Omit the words "at the time of filing such notice."

Page 655. In sub-section 3 of section 77. The words in line 2 "at any time during the currency of such writ" should be transposed and should stand after the word "lands" in line 3.

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Registration of Title to Land

CHAPTER I.—INTRODUCTORY.

SECTION 1.—THE MEANING OF REGISTRATION OF TITLE.

Registration, as applied to land, may be defined as a system of recording in a public office from time to time transactions with land, or the mere fact of ownership of some interest in land.[1] Registers, or registries, constituted for these purposes, or either of them, are called by various names—such as land registers, deed or instrument registers, registers of sasines (in Scotland), registers of title, &c. But apparently every system of registration in the Empire, that is concerned with keeping up a record of either transactions with land or its ownership, can be classed as deed registration or title registration. By deed registration—or registration of deeds—is meant primarily a system under which instruments are recorded merely as such, and not with special reference to the land they purport to affect. By title registration—or registration of title—is meant primarily a system under which a record is made of the title to some particular land as vested in some particular person for the time being, or of instruments as affecting some particular land. The same system, however, may be one for both registration of deeds and registration of title.

Although, apart from a combination of deed and title registration in one, there seems to be no third system of registration as above defined, statutory provision is made in some jurisdictions for obtaining a judicial declaration of title and placing this formally on record by registering at a deed or title registry.[2] But this hardly constitutes what is generally understood by a system of registration, since the only object of such statutes is to record the fact of indisputable ownership once for all, without providing for future transactions. The judicial declaration of title, amounting as it does to a warranty of the title, is however an important feature in systems of registration of title. In fact,

[1] The general objects of registration are stated in *Munro* v. *Didcott* [1911] A. C. 140, 149.

[2] In England—Declaration of Title Act, 1862 (c. 67); Ontario—Quieting Titles Act (R. S. 1914, c. 123); British Columbia—Quieting Titles Act (R. S. 1911, c. 192); New Brunswick—Land Titles Act (1914, c. 22); Falkland Islands—Titles to Land Ordinance 1904 (No. 6).

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registration of title may be said to take over to itself the prominent features of both deed registration and judicial declaration of title.

Registration, then, being divided into title and deed registration, it becomes necessary in the case of every system to decide to which class it belongs. The two classes shade off into each other, and it is a matter of some difficulty to distinguish with complete accuracy between registration of title and registration of deeds. Any dividing line between the two must be to some extent arbitrary, and each division will contain systems closely resembling systems on the other side of the line. In distinguishing between title and deed registration systems in other books, the necessity for an accurate dividing line has not been so pressing, and sufficient attention has not been paid to the importance, on the ground of convenience, of including in title registration only such systems as contain some provision for State warranty of title.[3] And since the mere registering or recording a judicial declaration of title without provision for future transactions is also excluded from registration of title as a system, registration of title proper comes to be more than a mere system of registration. It is essentially a system of conveyancing based on registration.

Of the various registration systems in force throughout the British Empire, twenty-eight are for the purpose of this book classed as registration of title. These twenty-eight systems will be enumerated later on. It is only necessary here to refer to some of their features in order to indicate the principle on which the selection has been made.

Registration of title, then, is in this book only predicated of systems of registration which conform more or less closely to the following four characteristics:

1. The land is initially placed on the register as a unit of property.

2. Transactions are registered with reference to the land itself, and not merely as instruments executed by the owner.

3. Registration of transactions is essential to their validity.

4. Registration, initial or of subsequent transactions, acts in some degree as a warranty of title in the person registered as owner, and as a bar to adverse claims.

[3] See Aust. Torr. Syst., 3, 4; Own. & Inc., 3, and preface. According to the more convenient classification adopted in this book, the Scottish and South African systems are ranked as systems of deed registration; this is referred to in the text later on.

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1. Placing land on the register as a unit of property means for practical purposes that the land must be identified as a particular parcel.[4] It does not necessarily follow that the area or boundaries cannot subsequently be corrected.[5] In practice initial or first registration is usually made, if not in a separate registry office, at least in a new set of books, and if title and deed registration are carried on by the same officials or in the same office, the two systems are usually carried on separately. However, in British Columbia a registry of deeds forms part of the registration machinery, though the system is on the whole distinctly one of registration of title.[6] A system which is excluded, though near the line, is that of Cyprus; land there is compulsorily placed on the register, and in all other respects conforms to the definition of registration of title, except that registration has no statutory effect in barring adverse claims.[7]

2. It is, in principle, the title to the land and not merely the instrument between the parties that is registered; hence the necessity for better identification of the property dealt with, and for greater discretionary powers in the registrar with respect to accepting instruments or transactions for registration.[8] Some deed registration systems, however, approximate closely to title registration in the procedure for registering transactions, by rendering search against particular parcels of land more easy, and by conferring greater powers on the registrar. The "search sheet" system in Scotland brings the Scottish deed registration very close to registration of title with regard to facility of search.[9] The case of Cyprus (*supra*) affords an illustration of extended powers in the registrar.

3. Though not more important than the two characteristics already referred to, the necessity for registration as part of every completely valid transaction is a much more prominent feature of

[4] As in *In re Lillis* (1899) 4 Terr. R. 300.

[5] Illustrations are: *Burden* v. *North Alberta Registror* (1913) 25 West. R. 460; On. 1914, ss. 24 (7), 98 (1).

[6] *Canodion Birkbeck Invest. Co.* v. *Ryder* (1905), 12 B. C. R. 92. 2 West. R. 158; *Howard* v. *Miller* [1915] A. C. 318.

[7] Titles Registration Law 1885 (No. 7), s. 10 is: "No registration under the provisions of this law shall operate as a bar to the legal rights of any person in respect of the property registered." And see Land Transfer (Amendment) Law 1890 (No. 19), ss. 1, 2 and 6 of which in particular contain certain provisions proper to title registration systems.

[8] *Re North-West Telephone Co.* (1909) 12 West. R. 300; *In re Reliance G. M. Co.* (1908) 13 B. C. R. 482.

[9] Report of Royal Commission on Registration of Title in Scotland, 1910 (Cd. 5316, 5357).

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title registration systems.[10] It is perhaps the feature most frequently insisted on when title and deed registration are contrasted inter se.[11] This necessity for registration of transactions or instruments is, however, a part of several systems that must for other reasons be classed as deed registration systems. Examples are: Scotland, South Africa,[12] Labuan,[13] and also Cyprus (*supra*).

4. The statutory warranty of title, which makes the registration of each successive owner a bar to adverse claims, is the feature in which title registration differs most from deed registration. No system of deed registration enables a purchaser to get a good title merely by succeeding his vendor on the register, or saves the necessity for investigation of prior title. In the case of the Falkland Islands[14] and New Brunswick[15] some approach is made to this, by provisions in registry statutes for a judicial decree of declaration of title; but the decree is merely registered at the deeds registry, and no provision is made for the protection of future owners, so that these enactments are rather on the footing of the English, Ontario, and British Columbia Declaration of Title or Quieting Title Acts[16] already referred to, and introduce no system of title registration. In some systems more than one kind of warranty of title is provided for. But even the weakest warranty implied by registration is founded on some investigation of the right of the applicant to be registered, though this investigation may be slight or even perfunctory.[17] In deed registration systems, as a rule, any instrument proffered for registration is accepted without enquiry as to its contents and effect, and the fact of registration carries with it no implication of title prior to registration. The system of Cyprus has already been referred to as one which is excluded from systems of registration of title by reason of its affording no bar to adverse claims. Other similar systems of

[10] *Perpetual Executors Assoc.* v. *Hosken* (1912) 14 C. L. R. 286; *Crowley* v. *Templeton* (1914) 17 C. L. R. 457; *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575; *Shore* v. *Green* (1890) 6 Man. R. 322.

[11] *Bishop* v. *Hunt* (1906) 26 N. Z. R. 950.

[12] *Crowly* v. *Bergtheil* [1899] A. C. 374.

[13] Ordinance No. 7 of 1849.

[14] Titles to Land Ordinance 1904 (No. 6). This is the deed registry statute itself.

[15] Land Titles Act (1914, c. 22). This is closely modelled on part of the Nova Scotia Act of 1903-4, but goes no further than providing for a judicial decree and its registration in a deeds registry.

[16] In British Columbia some of the provisions of the Quieting Titles Act are incorporated in the registration statute: see B. C. 1911, s. 116 C.

[17] *Hudson's Bay Co.* v. *Kearns* (1896) 4 B. C. R. 536; Eng. 1875, s. 6; On. 1914, s. 11.

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local and partial application are to be found in New Zealand [18] with respect to native land, and in the Straits Settlement of Malacca with respect to land held under local native custom.[19]

SECTION 2.—THE SEPARATE SYSTEMS AND JURISDICTIONS.

There are, throughout the British Empire, twenty-eight separate systems of registration of title, each based on a separate set of statutes, and covering thirty-one territorial divisions, three systems being in force in more than one territorial division. There is no precisely accurate and quite convenient word by which to designate these territorial divisions, and the word "jurisdiction" must be used for want of a better. There are, then, twenty-eight systems and thirty-one jurisdictions, and these may be divided into five groups—partly geographical and partly political—as follows:

UNITED KINGDOM GROUP.

1. England.
2. Ireland (legislation of United Kingdom).

AUSTRALASIAN GROUP.

The six States and three Territories of the Commonwealth of Australia, with New Zealand and Fiji, viz.:

3. New South Wales.
4. Queensland.
5. South Australia.
6. Tasmania
7. Victoria.
8. Western Australia.
9. Papua (Territory of the Commonwealth).

9a. Northern Territory of Australia (legislation of South Australia adopted).

9b. Territory for the Seat of Government (legislation of New South Wales adopted).

10. The Dominion of New Zealand.
11. The Crown Colony of Fiji.

[18] Aust Torr. Syst. 23, as to Native Land Acts, now replaced by Native Land Act, 1909.

[19] *Jayah bin Kachi* v. *Sakria* (1888) 4 Kyshe Str. Sett. 413.

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CANADIAN GROUP.

Six Provinces and the Territories of the Dominion of Canada, viz.:

12. Ontario.
13. British Columbia.
14. Manitoba.
15. Saskatchewan.
16. Alberta.
17. North-West Territories (legislation of Dominion of Canada).
17a. Yukon District (legislation of Dominion as in North-West Territories).
18. Nova Scotia.

CROWN COLONIES GROUP (INCLUDING ONE PROTECTORATE).

19. British Honduras.
20. Trinidad-Tobago.
21. Jamaica.
22. Leeward Islands.
23. Federated Malay States.
24. Ceylon.
25. The Gambia.

PROTECTORATE GROUP.

26. East Africa.
27. Uganda.
28. Sudan.

Taking each of the five groups separately, a list of the principal statutes is here given, with some observations on the features of each group as a whole, and on the case law and text-books applicable to each. The list of statutes is not exhaustive, since there are, scattered through the statute books of all the jurisdictions, Acts and sections of Acts relating indirectly, or in matters of detail or practice, to land held under registered title. These subsidiary Acts and sections can usually be found by referring to text-books or other local sources. In some instances statutory rules are included in the list of statutes.

As will be pointed out at the end of the present section, only twenty-two of these systems and jurisdictions are treated of in detail subsequently, six systems being omitted as not of sufficient importance to require more than occasional reference.

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I. *United Kingdom Group.*

England:

Land Transfer Act 1875 (38 & 39 Vict. c. 87).[1]

Land Registry (Middlesex Deeds) Act 1891 (54 & 55 Vict. c. 64).

Land Transfer Act 1897 (60 & 61 Vict. c. 65).

Land Transfer Rules 1903, 1907, 1908, printed in consolidated form (1912).

Ireland:

Local Registration of Title (Ireland) Act 1891 (54 & 55 Vict. c. 66).

An Act of 1908 (8 Edw. 7, c. 58) has expired, and an Act of 1909 (9 Edw. 7, c. 36) is of local importance only.

Orders and Rules 1 Sept. 1910.

The English and Irish statutes, though enacted by the same legislature, differ in many respects from each other. The Irish statute omits the enactments relating to the "possessory title" of the English statutes, but contains a provision which permits of initial registration without complete investigation of title.[2] On the other hand, the prescribed statutory instruments are (as in England) required to be under seal; in most other jurisdictions sealing is not required. The Irish system approximates more than the English to a system of deed registration,[3] therein resembling somewhat the system in British Columbia. Both English and Irish statutes make express provision for assurances by unregistered instruments, a feature existing also in Ontario, where the English statutes have been adopted.

Little has yet been done in the way of developing the system in England by means of case law. More has been done in Ireland, but the number of reported cases is still small compared with the number in some other groups. There are, however, several decisions of the Irish courts on the effect of unregistered instruments. In England there are only two reported cases where questions of first rate importance have been raised.[4] The view taken by the Court of Appeal in those cases of the nature of a registered

[1] The Acts of 1875 and 1897, with the Rules of 1903, are printed in a consolidated form in Own. & Inc. 276 *et seq.*

[2] I. 1891, s. 29. See *In re Keogh & Kettle* [1896] 1 I. R. 285; *In re Owen Smith* [1917] 1 I. R. 170.

[3] I. 1910 O. 4, r. 20; *In re McEvoy* [1917] 1 I. R. 168.

[4] *Capitol & Counties Bank* v. *Rhodes* [1903] 1 Ch. 631; *Atty.-Gen.* v. *Odell* [1906] 2 Ch. 47. Criticism of the former will be found in Own. & Inc. 91, 92, 121.

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proprietor's interest is one that would hardly be adopted in any other jurisdiction, and must seriously hamper the English system in its juridical development. It has been judicially recognized in Ireland that the new system is intended to cheapen and facilitate land ownership and conveyancing in accordance with the needs of a peasant proprietary.[5]

Text-books dealing specially with the English system are:

Brickdale & Sheldon's Land Transfer Acts (2nd Ed. 1905).
Williams' Vendor and Purchaser (2nd Ed. 1911), chapter XX.
Hogg's Ownership and Incumbrance of Registered Land (1906).
Hogg's Precedents for Registered Land (1907).
And with the Irish system:
Browning and Glover's Registration of Title in Ireland (2nd Ed. 1912).

II. *Australasian Group.*

New South Wales:

Real Property Act 1900 (No. 25).
Real Property and Conveyancing (Amendment) Act 1901 (No. 68).[6]
Centenary Park Sale (Conveyancing) Act 1905 (No. 6).
Darling Harbour Land Titles Act 1907 (No. 10).
Sydney Harbour Trust Land Titles Act 1909 (No. 7).
Registration of Deeds Act 1897 (No. 22), s. 6 (5).[7]
These statutes are also (so far as applicable) in force in the Territory for the Seat of Government.[8]

Queensland:[9]

Real Property Act 1861 (25 Vict. No. 14).
Real Property Act 1877 (41 Vict. No. 18).
Registration of Titles Act 1884 (48 Vict. No. 4).
Undue Subdivision of Land Prevention Act 1888 (49 Vict. No. 15).
Real Property (Local Registries) Act 1887 (51 Vict. No. 3).
Settled Land Act 1886 (50 Vict. No. 13), ss. 69, 70.

[5] *In re Keogh & Kettle* [1896] 1 I. R. 285.

[6] These two statutes are printed in Aust. Torr. Syst. 87 *et seq.*

[7] This enactment is referred to in Aust. Torr. Syst. 756.

[8] Seat of Government Acceptance Act 1909 (No. 23, Commonwealth), s. 6; Seat of Government (Administration) Act 1910 (No. 25, Commonwealth), s. 4.

[9] All the statutes here mentioned are printed in Aust. Torr. Syst. 171 *et seq.*

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South Australia:[10]

Real Property Act 1886 (No. 380).
Real Property Amendment Act 1887 (No. 403).
Real Property Amendment Act 1893 (No. 569).
These statutes are also in force in the Northern Territory of Australia.[11]

Tasmania:[12]

Real Property Act (1862, 25 Vict. No. 16).
Real Property Act No. 2 (1863, 26 Vict. Sess. 2, No. 1).
Real Property Act No. 3 (1867, 31 Vict. No. 17).
Real Property Act No. 4 (1878, 42 Vict. No. 9).
Real Property Act No. 5 (1886, 50 Vict. No. 8).
Real Property Act No. 7[13] (1893, 57 Vict. No. 5).

Victoria:

Transfer of Land Act 1915 (No. 2740).[14]
Conveyancing Act 1915 (No. 2633), ss. 14-26, 32.
Real Property Act 1915 (No. 2719), ss. 150-156,[15] 173-175.
Execution of Instruments Act 1915 (No. 2757)—a temporary war Act.
Transfer of Land Act 1916 (No. 2849).

Western Australia:

Transfer of Land Act 1893 (56 Vict. No. 14).
Settled Land Act 1892 (55 Vict. No. 10), ss. 69, 70.
Transfer of Land Act 1893 Amendment Act 1896 (60 Vict. No. 22).
Transfer of Land Act Amendment Act 1902 (2 Edw. 7, No. 10).[16]
Transfer of Land Act Amendment Act 1909 (No. 54).
Transfer of Land Act Amendment Act 1911 (No. 26).
Execution of Instruments Act 1916 (No. 8)—a temporary war Act.

[10] All the statutes here mentioned are printed in Aust. Torr. Syst., 332 *et seq.*

[11] Northern Territory Acceptance Act 1910 (No. 20, Commonwealth), s. 7; Northern Territory (Administration) Act 1910 (No. 27, Commonwealth), s. 5.

[12] All the statutes here mentioned are printed in Aust. Torr. Syst. 418 *et seq.*

[13] No. 6 in the series is repealed: see Aust. Torr. Syst. 64, 488.

[14] This statute (a consolidation) replaces (amongst others) the three Acts printed in Aust. Torr. Syst. 497 *et seq.*, 598 *et seq.*, and 604.

[15] These sections (part of a consolidating statute) replace the sections printed in Aust. Torr. Syst. 595 *et seq.*

[16] These four statutes are printed in Aust. Torr. Syst. 605 *et seq.*

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Papua:

Real Property Ordinance 1913 (No. 13).[17]
Real Property Ordinance 1914 (No. 13).
For the Northern Territory of Australia, and the Territory for the Seat of Government, see South Australia and New South Wales, *supra.*

New Zealand:

Land Transfer Act 1915 (No. 35).[18]
Regulations 22nd Jan. 1914.

Fiji:

Real Property Ordinance 1876 (No. 7, Ed. 1906).[19]

The only one of the nine systems in this group that differs very considerably from the others is that of Fiji. The Fiji statute bears internal evidence of having been drafted with some regard to Scottish law.[20] The chief difference is that the statute contains no provision for bringing land under the system otherwise than upon a grant from the Crown, and it has therefore not been thought necessary to make provision for indemnity—by means of an assurance fund or otherwise—against loss through wrongful registration. The systems of this group were the first to be known collectively as the Torrens system, being derived more or less directly from the South Australian Act of 1857 of which Sir Robert Torrens was the promoter.[21] The points of real difference among these nine systems are few. Perhaps the most important are those relating to the effect of a registered title as against adverse possession, and to the foreclosure of mortgages.

Every one of the jurisdictions of this group has, as the foundation of its jurisprudence, the English common law and rules of

[17] This statute, substantially a consolidation of the Queensland Acts (but with some amendments) replaces the British New Guinea Ordinance printed in Aust. Torr. Syst. 259. The Territory is now under the control of the Commonwealth and re-named Papua: Papua Act 1905 (No. 9, Commonwealth), commencing by proclamation 1st Sept. 1906.

[18] This statute (a consolidation) replaces an Act of 1908 (amended), which itself replaced the Acts printed in Aust. Torr. Syst. 261 *et seq.* The present statute is actually an appendix to the Land Transfer Acts Compilation Act 1915, which contains some provisions as to its construction. The statute itself, the Compilation Act, and the Regulations of 1914, are issued in a convenient form, with some further Regulations and an Index, by the New Zealand Government Printer.

[19] This statute (a consolidation) replaces the Ordinances printed in Aust. Torr. Syst. 668 *et seq.*

[20] Aust. Torr. Syst. 668; Parliamentary Return of 1881 on Registration in the Australian colonies.

[21] Aust. Torr. Syst. 20.

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equity. This is important in considering the question of the extent to which the registration statutes have indirectly affected rights of property, and is particularly to be recognized in view of the fact that in some of the jurisdictions in other groups the system of registration of title has been erected upon a foundation of jurisprudence which is not purely English.

The amount of case law developed by litigation is considerable. This is due largely to imperfect draftmanship of the statutes, which has made it often extremely difficult to discover with precision how much alteration was actually effected in the existing rules of conveyancing and real property law. A more conservative view than formerly is now taken of the degree of change effected,[22] but it is still found difficult both to interpret the actual language of the statutes, and to discover to what extent the reform in the procedure of conveyancing has made any change in substantive rights in land as recognized by ordinary English law.

The Australasian group differs from the United Kingdom group in avoiding the use of deeds, so that the statutory instrument usually has no operation apart from the effect conferred on it by the statutes. Another point of difference is the absence of the express permission to create interests in land by ordinary conveyances, &c., unregistered. The "possessory title" of the English system also is unknown in the Australasian group.

The Australian system—and this will apply to other systems, such as that in force in some parts of Canada, based upon it—is intended to simplify and facilitate transactions with land, as well as to give greater security of title.[23] The rule—made statutory in some jurisdictions[24]—that statutes are in the nature of remedial legislation, and are to be given a liberal construction accordingly, seems to have been acted on generally with respect to the registration statutes.[25]

The following text books deal with the systems of this group as a whole:

Badger's Land Transfer Laws of Australasia (1888).

[22] *In re Martin* [1900] S. A. R. 69, affd. by Privy Council *sub nom. McEacharn* v. *Colton* [1902] A. C. 104; *Borry* v. *Heider* (1914), 19 C. L. R. 197.

[23] *Perpetual Executors Assoc.* v. *Hosken* (1912) 14 C. L. R. 286; *Reg.-Gen.* v. *Wright* (1917) 23 C. L. R. 214; *Fels* v. *Knowles* (1906) 26 N. Z. R. 604, 620.

[24] For instance: South Australia—Acts Interpretation Act 1915 (No. 1215), s. 22; New Zealand—Acts Interpretation Act 1908 (No. 1), s. 6 (i).

[25] The statutory rule was relied on in *Reg.-Gen.* v. *Wright*, *supra*.

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Power, Groom and Graham's Torrens Australasian Digest (1899).

Hogg's Australian Torrens System (1905).

The following deal with individual systems:

New South Wales—Canaway's Real Property Act (1902).

Queensland—Power, Groom and Graham's Real Property Acts (1902).

Victoria—Duffy and Eagleson's Transfer of Land Act (1895).
Guest's Transfer of Land Act (1895).
The official edition of the statutes in Victoria contains in footnotes references to cases decided, in the Supreme Court of Victoria and (on appeal from that Court) in the High Court of Australia, upon each section of the statutes.

New Zealand—Hutchen's Land Transfer Act (1910).

III. *Canadian Group.*

Ontario:

Land Titles Act (R. S. 1914, c. 126).
Amending Act (1914), 4 Geo. 5, c. 24.
Statute Law Amendment Act 1915 (c. 20), s. 14.
Amending Act (1917), 7 Geo. 5, s. 31.
Land Titles Amendment Act 1918 (c. 28).
Rules 26 Sept. 1911.[26]
Town Sites Act (R. S. 1914, c. 34).
Short Forms of Mortgages Act (R. S. 1914, c. 117).
Execution Act (R. S. 1914, c. 80), s. 10.
Registry Act (R. S. 1914, c. 124), ss. 3, 4, 74, 94.

British Columbia:

Land Registry Act (R. S. 1911, c. 127).
Land Registry Act Amendment Act 1912 (c. 15).
" " " 1913 (c. 36).
" " " 1914 (c. 43).[27]
" " " 1915 (c. 33).
" " " 1916 (c. 32).
" " " 1917 (c. 33).
" " " 1918 (c. 41).

[26] These Rules, made under the repealing Act of 1911, appear to be still in force; they are issued with the official copy of the Land Titles Act 1911 by the King's Printer at Toronto.

[27] The first four of these statutes are printed and issued officially in a consolidated form.

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Manitoba:

Real Property Act (R. S. 1913, c. 171).[28]
Amending Act, (1914), 4 Geo. 5, c. 90.
" (1915), 5 Geo. 5, c. 59.
" (1917), 7 Geo. 5, c. 72.
" (1919), 9 Geo. 5, c. 85.

Saskatchewan:

Land Titles Act 1917 (Sess. 2, c. 18).[29]
Amending Act (1918-19), c. 19.

Alberta:

Land Titles Act (1906), c. 24.
Amending Act (1915), c. 3.
Amending Acts (1919), cc. 12, 37.
The following sections of Statute Law Amendment Acts—
1907, c. 5, s. 19.
1908, c. 20, s. 15.
1909, c. 4, s. 11; c. 5, s. 9.
1910 (Sess. 2), c. 2, s. 12.
1911-12, c. 4, s. 15.[30]
1913, c. 9, s. 13; (Sess. 2) c. 2, s. 9.
1914, c. 2, s. 9.
1915, c. 2, s. 25.
1916, c. 3, s. 15.
1917, c. 3, s. 40.

North-West Territories (Dominion of Canada):

Land Titles Act (R. S. Canada 1906, c. 110).
Amending Act (1908), 7 & 8 Edw. 7, c. 41.
" (1910), 9 & 10. Edw. 7, c. 36.
Apportionment of Assurance Fund, Territories, Saskatchewan, Alberta (1908), 7 & 8 Edw. 7, c. 42.
These statutes are also in force in the Yukon District.

Nova Scotia:[31]

Land Titles Act (1903-4), 3 & 4 Edw. 7, c. 47.

[28] This statute (a consolidation) replaces the Acts printed in a consolidated form in Can. Torr. Syst. 404 *et seq.*

[29] This statute (a consolidation) replaces the Acts printed in a consolidated form in Can. Torr. Syst. 465 *et seq.*

[30] The statute, as amended up to this point, is printed in a consolidated form in Can. Torr. Syst. 551 *et seq.*

[31] Nova Scotia is one of the six jurisdictions omitted from detailed consideration. The system has only been brought into operation in a few counties, and seems to have made little progress. The statute is an adaptation of parts of the Ontario statute. See an article on "Uniformity in Registration of Title Law," Can. Law Times xxxvii. 374, 378 (1917).

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The Canadian group is not as homogeneous as the Australasian. The Ontario and Nova Scotia statutes are modelled to a great extent on the English statutes. The Ontario system is contained in statutory Rules in addition to the Acts, as in both systems of the United Kingdom, and the express permission to create interests by unregistered disposition is also adopted. Both Ontario and Nova Scotia also provide for the "possessory" title. On the other hand sealing is made unnecessary, the Australasian model being here followed in preference to that of the United Kingdom, and there are other borrowings from the Australasian statutes.

British Columbia has a system peculiar to itself, one feature of which is that deed and title registration are combined. Under a different nomenclature the system contains the English feature of "possessory" title, thus resembling Ontario and Nova Scotia, and differing from the Australasian group, which in some other respects it closely resembles.[32] Though the statutory form of transfer on conveyance is under seal, sealing is not essential for a charge or a transfer, but the requirement of registration for all transactions is stringent.[33] There is a tendency in the direction of Scottish law similar to that in the Fiji statute.

In Manitoba, Saskatchewan, Alberta, and the North-West Territories, the Australasian model has been closely followed, and the term "Torrens" is applied as commonly to the statutes of these four jurisdictions as to the Australasian statutes. One point on which the latter have not been so closely copied is as to the powers of mortgagees and the foreclosure of mortgages. There is the same diversity as in the Australasian group in regard to the relation of the registered title and adverse possession. Among minor points of difference, some of the Canadian statutes authorize the registrar to "grant" a certificate of title, in the sense in which "issue" is used in Australian statutes; the form of transfer also in some jurisdictions need not contain any such note of existing incumbrances as is provided for in Australian statutes.

English law, just as in Australasia, is the foundation of the jurisprudence of all these jurisdictions.

As in Australasia, the case law produced by litigation under the statutes of Manitoba, Saskatchewan, Alberta, and North-West Territories, has been considerable. The number of reported cases on the British Columbia statutes is much smaller, and the number in

[32] The British Columbia system is of nearly the same age as the Australian, but it developed independently of the latter. An historical account (not quite accurate in its reference to Australia) is given in *In re Shotbolt* (1888) 1 B. C. R. pt. II. 337.

[33] B. C. 1911, ss. 51, 104-106, as amended; Form L.

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Ontario still smaller again. There appear to be no Nova Scotia cases at all. The interpretation placed on the English statutes, with respect to the juridical position of the registered owner, does not appear to have been yet adopted in Ontario or Nova Scotia.

The four systems of Manitoba, Saskatchewan, Alberta, and the North-West Territories have been dealt with in Thom's Canadian Torrens System (1912). There appear to be no text-books dealing specially with the Ontario or British Columbia systems.

IV. *Crown Colonies Group* (including one Protectorate).

British Honduras:

Land Titles Registry Act (R. S. 1914, c. 179).

Trinidad-Tobago:

Real Property Ordinance (1902, No. 60).
Real Property (Amendment) Ordinance 1905 (No. 21).
Real Property Ordinance 1908 (No. 49).
Real Property (Amendment) Ordinance 1913 (No. 19).
Powers of Attorney Ordinance 1914 (No. 1).
Real Property (Amendment) Ordinance 1914 (No. 3).
Real Property (Amendment) Ordinance 1916 (No. 35).

Jamaica:

Registration of Titles Law 1888 (Law 21).
Registration of Titles Law 1888 Amendment Law 1888 (Law 31).
Registration of Titles Law 1888 Further Amendment Law 1889 (Law 20).
Registration of Titles Law 1888 Further Amendment Law 1894 (Law 14).
Registration of Titles Amendment Law 1900 (Law 5).
Registration of Titles Law Amendment Law 1903 (Law 10).
Hurricane Loans Law 1903 (Law 47), s. 8.
Registration of Titles Law Further Amendment Law 1906 (Law 6).
Registration of Titles Law 1888 Amendment Law 1909 (Law 22).
Registration of Titles Law 1888 Amendment Law 1910 (Law 33).

Leeward Islands:

Title by Registration Act 1886 (No. 1, 1914 Revision).
Hurricane Loan Title by Registration Amendment Act 1900 (No. 3).

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Federated Malay States:

Registration of Titles Enactment 1911 (No. 13).[34]
Registration of Titles Enactment 1911 Amendment Enactment 1913 (No. 16).

Ceylon:[35]

Land Registration Ordinance 1907 (No. 3).

The Gambia:[36]

Land Transfer Ordinance 1904 (No. 4).

The systems of this group differ considerably from each other. The Federated Malay States is a Protectorate, and has adapted its registration system from the Fiji statutes. The basis of general law in the federation is for the most part Mohamedan, and English law is only in force so far as it is expressly adopted by local legislation.[37] In adopting the Fiji statutes all reference to "fee simple" is excluded from the Malay statute.

In Ceylon the basis of general law is the Roman-Dutch law. In the other jurisdictions English law prevails.

One feature of the Ceylon statutes is found also in British Honduras; the warranty of title on initial registration is constituted by means of a short time limit after which adverse claims are barred in favour of purchasers. No provision is made for statutory forms of instruments. In Ceylon a system of deed registration forms part of the title registration system, somewhat as in British Columbia. The British Honduras statute is altogether less elaborate than others, and the system as compared with some is merely rudimentary. The original statute came into force in the same year (1858) that the Torrens system in Australia began its operation.[38]

[34] This federal statute has consolidated and replaced the statutes of the four separate States, these four statutes being practically identical in their provisions. References in two important Privy Council cases, and in Innes' Reg. of Title, are to one or other of the State statutes: see *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491; *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A. C. 209.

[35] Ceylon is one of the six omitted jurisdictions. Registration of Title seems to have made little progress. The statute cited is a consolidating and amending one, intended to replace Ordinances of 1877 and 1889, but not (up to March, 1915) put into force. In the 1913 Edition of the Ceylon statutes the Ordinances intended to be repealed are printed as well as the Ordinances of 1907.

[36] The Gambia is one of the six omitted jurisdictions. The statute is an adaptation (in a consolidated form) of the English Acts of 1875 and 1897, but not brought into operation, and intended to be repealed: Revised Edition of Ordinances (1916-17), vol. 1, p. 267; vol. 2, p. ix.

[37] See Jour. Comp. Leg. xvi. 24 (1916), article by J. R. Innes on Constitution of Federated Malay States; Bedwell's Legislation of the Empire, iii. 141, observations by T. Baty on State of Selangor.

[38] Aust. Torr. Syst. 20.

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The Jamaica and Trinidad-Tobago statutes are close adaptations of Australasian statutes. The Leeward Islands statutes, though to some extent following the Australasian model, are more original in draftsmanship and more elaborate than those of the other two jurisdictions. Amongst other differences the "possessory" title has been borrowed by the Leeward Islands from the English system; provision is also made for withdrawing land from the operation of the title registration system. A tendency towards Scottish law, as in Fiji and British Columbia, is to be observed, and the expression "fee simple" does not occur in the registration statutes.

There is not much local case law on the systems of this group, though most of the Australian and Canadian case law is applicable. The British Honduras statute has come up once for interpretation by the Privy Council.[39] In Trinidad-Tobago a few cases have been decided,[40] and the Supreme Court judgments are now published in the Gazette. A few cases have also been decided in Jamaica, but none have yet been published. Some reports of cases in the Federated Malay States are printed in Innes' Registration of Title (1913). That book is also the only text-book on any system in this group. The Ceylon reports contain no cases relating to registration of title, though there are cases on deed registration —principally questions of priority.

V. *Protectorates Group.*[41]

East Africa:

Land Titles Ordinance 1908 (No. 11).
Equitable Mortgages Ordinance 1909 (No. 14).
Land Titles Amendment Ordinance 1910 (No. 11).
Land Titles Amendment Ordinance (No. 2), 1910 (No. 22).
Land Titles Registration Amendment Ordinance 1914 (No. 23).
Land Titles Amendment Ordinance 1916 (No. 4).

Uganda:

Registration of Land Titles Ordinance 1908 (No. 11).
Equitable Mortgages Ordinance 1912 (No. 19).

Sudan:

Title of Lands Ordinance 1899 (No. 2).
Title of Lands Ordinance 1903 (No. 3).

[39] *Belize Estate Co.* v. *Quilter* [1897] A. C. 367.

[40] Two volumes of Supreme Court judgments have been published, out of which less than a dozen cases concern registration of title.

[41] East Africa, Uganda, and Sudan are among the six omitted jurisdictions. Each of the three systems presents special peculiarities of purely local interest.

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In these three systems the prominent feature is the placing of land on the register by settling claims to land. Statutory methods of dealing with land are not so prominent, and registration of transactions rather resembles deed registration. Whilst the general principles of the Australasian systems have been adopted, the Ceylon system has been drawn on to some extent. Equitable mortgages by deposit of certificate of title are specially provided for in East Africa and Uganda. In Uganda the statutes contemplate the system being completed by Rules. The Sudan system is rudimentary only. Indian statutory law has been largely adopted in East Africa, and land is frequently referred to in the local statutes as "immovable property." In the Uganda statutes the expression "fee simple" does not occur.

These three jurisdictions being technically Protectorates only, and not having been formally annexed by the British Crown, it might be difficult to say what is the basis of law underlying the statutory law.[42]

There are a few cases reported from East Africa,[43] but no textbooks have been published on registration law in these three jurisdictions.

As already mentioned, of the thirty-one jurisdictions (embracing twenty-eight different systems) above enumerated, twenty-two only are dealt with in detail in this book. Three jurisdictions—Northern Territory of Australia, Territory for the Seat of Government, Yukon—have systems identical with those in other jurisdictions; six—Nova Scotia, Ceylon, The Gambia, East Africa, Uganda, Sudan—are not of sufficient relative importance to justify detailed treatment. The twenty-two jurisdictions dealt with in the following chapters are:

England.
Ireland.
New South Wales.
Queensland.
South Australia.
Tasmania.
Victoria.
Western Australia.
Papua.
New Zealand.
Fiji
Ontario.
British Columbia.
Manitoba.
Saskatchewan.
Alberta.
North-West Territories.
British Honduras.
Trinidad-Tobago.
Jamaica.
Leeward Islands.
Federated Malay States.

[42] Reference may be made to Burge's Colonial & Foreign Law (new Ed.) i. 329, 337, 341. And see *In re Southern Rhodesia* [1919] A. C. 211.

[43] In the East Africa Reports (1897-1916), vols. 1-6, there are three cases relating to registration of title.

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SECTION 3—NOMENCLATURE.

The question of nomenclature arises for two reasons: (1) The same name does not always denote the same thing throughout the twenty-two systems, and occasionally not even in the same system; (2) Things that are substantially identical are not always denoted by the same name in different systems. It is therefore necessary to explain the meaning of some expressions that are apt to be ambiguous, and to avoid confusion and verbosity by using one name only for a thing that has different names in different systems. An example of the first kind is the expression "Real Property Act," which sometimes means a statute in a system of title registration and sometimes a statute in a system of deed registration. An example of the second kind is the word "registrar," meaning the official who conducts the business of a registry office; there are at least eleven different designations of this official throughout the twenty-two systems—"recorder of titles," "registrar of titles," "master of titles," &c.

"Absolute fee." "Absolute title." These expressions are used in the statutes in contrary senses. In British Columbia the registered owner of an "absolute fee" is only deemed primâ facie to be the owner;[1] the warranty given by registration is even more limited than that given by "possessory" registration in England, Ontario and Leeward Islands.[2] In England and Ontario, and also in Jamaica, an "absolute" title means a registered title to which the fullest warranty is accorded, what in British Columbia and Leeward Islands is called "indefeasible."[3] The expression "absolute and indefeasible" is also used in other jurisdictions with reference to a fully warranted title.[4] As far as practicable, in this book the British Columbia "absolute fee" is included in "possessory title" of other jurisdictions, and the "absolute" or "indefeasible" title of England, Ontario, Jamaica, British Columbia, and Leeward Islands, together with the warranted title of the Australasian group, and Canadian and other systems based on the Australasian type, are included in the expression "fully warranted" or "unqualified" title.

"Abstract." "Abstract of Title." "Registration abstract." "Abstract" and "abstract of title" are used in the Australasian systems—in the statutes, reported cases, and ordinary practice—in

[1] B. C. 1911, ss. 2, 23; *Howard* v. *Miller* [1915] A. C. 318, 324.
[2] Eng. 1875, s. 8; On. 1914, s. 12; L. Is. 1886 (1914), s. 126.
[3] Eng. 1875, s. 7; On. 1914, s. 10; J. 1888, s. 17; B. C. 1911, s. 22; L. Is. 1886 (1914), s. 131.
[4] Fi. 1876 (1906), s. 14; F. M. S. 1911, s. 8; B. H. 1914, sch. A, r. 7.

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the same sense as in ordinary English conveyancing, to denote a written summary of the documents and facts constituting a chain of title to land.[5] In the Canadian cases dealing with registration of title such an abstract is usually called a "solicitor's abstract," and by "abstract" or "abstract of title" is usually meant an official certificate of the contents of the register so far as it relates to a particular piece of land.[6] The "registration abstract" seems to be found only in some of the Australasian statutes and a few other statutes modelled on them, but not in any of the Canadian statutes; it is merely an unnecessary device for closing the register pending execution of documents abroad, and in Australia at any rate is nearly obsolete.[7]

"Charge." The word "charge," besides being ordinarily somewhat ambiguous through meaning both the interest created and the instrument creating it, has for the present purpose a further ambiguity.[8] In some systems "charge" includes and means a mortgage;[9] in others "charge" is distinguished from a mortgage,[10] and where this is so the word is used in some systems as the technical equivalent of "incumbrance" as a statutory instrument for securing payment of annuities, rent-charges," &c.[11] In the majority of the twenty-two systems [12] the word "charge," both as a verb and as a noun, is also employed to describe the operation of a mortgage in making land security for payment of money without effecting any transfer of the land itself to the mortgagee. In this book, as far as possible," "mortgage" will be used where mortgage is

[5] N. S. W. 1900, s. 16; Q. 1861, s. 17; S. A. 1886, s. 29; Tas. 1862, s. 15; V. 1915, s. 29; W. A. 1893, s. 30; N. Z. 1915, s. 21; *Davidson* v. *Brown* (1879) 5 V. L. R. L. 288; *Roberts* v. *Balfour* (1892) 18 V. L. R. 140; *Bodley* v. *Macdonald* (1901) 20 N. Z. R. 371; Martin's Conv. in N. Z. 49; Conv. & Prop. Law, 36.

[6] *Newberry* v. *Langan* (1912) 47 Can. S. C. R. 114; *Auriol* v. *Alberta Land Co.* (1912) 20 West. R. 185; *Canada Life Ass. Co.* v. *Assiniboia Registrar* (1912) 21 West. R. 469.

[7] Aust. Torr. Syst. 914, 915; V. 1915, ss. 192-195; N. Z. 1915, ss. 137-144; Fi. 1876 (1906) ss. 78-81; Tr. 1902, ss. 87-91; J. 1888, ss. 118-121; L. Is. 1886 (1914) ss. 149, 150. The enactments are omitted in the statutes of South Australia, Western Australia, and Papua.

[8] For further special ambiguities, see Aust. Torr. Syst. 968.

[9] Eng. 1875, s. 22; I. 1891, s. 40; On. 1914, s. 30; B. C. 1911, ss. 2, 29; F. M. S. 1911, s. 43. In New Zealand "mortgage" includes charges of every kind; N. Z. 1915, s. 2.

[10] V. 1915, s. 145; W. A. 1893, s. 105, and 1909, s. 13; Tr. 1902, s. 74; J. 1888, s. 78.

[11] See preceding note.

[12] The exception is British Honduras, where no particular form of mortgage is prescribed or referred to. In British Columbia also no form of mortgage is prescribed, but the register of "charges" is kept distinct from that of ownership.

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meant, and "charge" used to denote a charge other than a mortgage.

"Grant." In Australasia "grant" is often used to mean a Crown grant as distinguished from a certificate of title. In Canada "grant" is used as a verb synonymous with "issue" in Australasia; a certificate of title is said in Canada to be "granted," and in Australasia to be "issued" or to "issue."

"Incumbrance." "Incumbrancer." "Incumbrancee." In some systems "incumbrance" has the technical meaning of a charge on land, otherwise than by way of mortgage, to secure such payments as annuities and rent-charges. In these systems, and also in British Columbia, "incumbrancer" is used in the unusual sense of the person creating the charge, and "incumbrancee" is coined to denote the person in whose favour the charge is made.[13] The use of these words will be avoided in this book, as far as possible, and "incumbrancer" (when used) will have its ordinary meaning, so far as possible, of the person to whom the money charged is due.

"Possessory title." In the systems of England, Ontario, and the Leeward Islands, the expression "possessory title" is used in the technical sense of a title to land registered without any warranty of the owner's title prior to registration, as distinguished from "absolute title." Title by long possession under Limitation Acts is sometimes spoken of as a possessory title, but the latter expression will in this book be confined to the "possessory title" referred to in the three systems mentioned.

"Real Property Acts." The registration statutes of New South Wales, Queensland, South Australia, Tasmania, Papua, Fiji, Manitoba, and Trinidad-Tobago, are known as "Real Property" Acts or Ordinances. In dealing with the statutes of Victoria—the title registration statutes there being called "Transfer of Land Acts"—it is necessary to remember that the statutes known as "Real Property Acts" do not relate to registration of title (except incidentally), but that the statutes relating to registration of deeds are included among "Real Property Acts." These Victorian statutes, therefore, for the most part have nothing to do with the subject of the present book. The enactments of the Real Property Act 1915

[13] N. S. W. 1900, s. 56; Q. 1861, s. 56; S. A. 1886, s. 128; Tas. 1862, s 52; P. 1913, s 46; N. Z 1915, sch. 2 f. F.; Fi. 1876 (1906) s. 58; B. C. 1911, s. 2; M. 1913, s. 107; Sas. 1917, s. 98; Al. 1906, s 60; Can. 1906, s. 94; L. Is. 1886 (1914) ss. 50, 51. For the origin of the "incumbrance," see Aust. Torr. Syst. 28, 968.

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cited in the list (*ante*, p. 9) of Victorian statutes deal only with questions of survey boundaries and voluntary conveyances.

"*Register.*" The word "register," as a noun, has more than one meaning. In some of the English statutes it is often used to denote the single page, folio, or perhaps even book, in or on which are made entries relating to a particular piece of land, or entries of a particular class of transactions. In the majority of the statutes "register" is commonly used in the sense of "register book," and sometimes in a still wider sense, including the whole mass of papers filed at a registry.[14] The context is often the only guide as to which meaning is intended.

The list of conventional terms has now to be given and explained.

"*Certificate of title.*" The duplicate of the entries in the register, which in the majority of jurisdictions is called a certificate of title, duplicate certificate of title, or sometimes certificate only, is in Ontario known as the "certificate of ownership," and in England and Ireland "land certificate." "Certificate of title" will, in this book, usually mean and include the land certificate of England and Ireland, and the certificate of ownership of Ontario. It may be mentioned that no provision for issue of any certificate of title is made in British Honduras, but office copies of the register may be issued.[15]

"*Crown grant.*" In Canada a grant from the Crown is commonly called a Crown patent, or simply patent. "Crown grant" will mean and include the Canadian Crown patent.

"*Initial Registration.*" This expression will be used to describe what is in some systems called "first registration," and in others "bringing land under the Act" or "bringing land under the new system," &c.

"*Registered land.*" Land that is brought under what is in several Canadian statutes referred to as "the new system" will be referred to as "registered land," a convenient expression used in the English statutes, and also in recent Victorian statutes.[16] Land still remaining under the "old system" or "general law" will usually be referred to as "unregistered land."

"*Registered owner.*" This expression occurs in the Irish and some of the Canadian statutes in place of the "registered pro-

[14] Own. & Inc. 81, 82; Aust. Torr. Syst. 763.

[15] B. H. 1914 s. 39.

[16] V. 1915 s. 87, re-enacting V. 1914 (No. 2) s. 4. "Register the land" occurs in *In re Woods* (1869) 6 W. W. & a' B. L. 233.

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prietor" of the English, Australasian, and some other statutes. It will be used as including "registered proprietor." The words "owner" and "proprietor" are properly synonyms.[17]

"Registrar." This word will generally be used as including officials described in various statutes as registrar-general, registrar of titles, recorder of titles, master of titles, commissioner of titles, &c.

"Registration statutes." "Statutes." The various enactments dealing with registration of title will be referred to usually as "statutes," and "registration statutes," whether they be Acts, Ordinances, or Enactments, and whether properly known as Land Transfer Acts, Land Titles Acts, or Real Property Acts, &c.

"Registry." This word will be used to denote the office where registration is carried out, though variously called Land Registry, Land Titles Office, Office of Titles, &c.

"Fully warranted title." "Unqualified title." These expressions (more generally the former) are used to denote the ordinary warranted title in Australasian, most Canadian systems, and other systems modelled on the Australasian type: they also include, as far as practicable, the "absolute" title of England, Ontario, and Jamaica, and the "indefeasible" title of British Columbia and the Leeward Islands.

[17] See Royal Commissioner's 1857 Report, referred to in Own. & Inc. 92. In L. Is 1886 (1914) sch. A "Owner," this identity of meaning is assumed in making a temporary distinction.

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CHAPTER II.—INITIAL REGISTRATION AND REMOVAL FROM REGISTER.

SECTION 1.—REGISTRABLE INTERESTS.

The initial registration of land consists of two operations: The land is for the first time placed on the register, and the title of the owner for the time being is authoritatively declared. The result is that for the future the rules of the new system apply to the land in lieu of those applicable to unregistered land, one of the most important of these being that the register becomes in itself evidence of title or ownership. The present section deals with two questions: (1) What interests in land regarded as rights of property can be the subject of initial registration; (2) What interests with reference to the personality of the owner will constitute a right to have initial registration effected. As a matter of convenience "leasehold land" will be included under the first head, and "tenant for life" under the second.

1. In general nearly every substantial interest in land can be registered, from complete ownership—whether ownership in fee simple under English law or ownership under the civil law or Mohamedan law—to terms of years and rights in the nature of easements, and from the whole of the soil itself *a coelo usque ad inferos* to undivided shares and shares divided both vertically and (so far as English law is concerned) horizontally. For the most part, land as a subject of registration is defined in the different statutes widely enough to embrace hereditaments and immovable property of every kind. There is, however, a lack of uniformity with regard to terms of years, undivided shares, mines, and incorporeal hereditaments.

In sixteen of the jurisdictions there is express or implied authority for the initial registration of terms of years or leaseholds. In four of these—South Australia, Papua, New Zealand, Federated Malay States,[1]—provision is made only with respect to leases by grant from the Crown or State. In eight—England, Ireland, Ontario, New South Wales, Victoria, Western Australia, Trinidad-Tobago, Jamaica[2]—express provision is made with respect to lease-

[1] S. A. 1886, s. 93; P. 1913, s. 32; New Zealand, Land Act 1908 (No. 94), s 90; F. M. S. 1911, ss. 27, 28.

[2] Eng. 1875, s. 11; I. 1891, s. 53; On. 1914, s. 16; N. S. W. 1900, ss. 14 (2), 34; V. 1915 s. 38; W. A. 1893, s. 39, and 1909, s. 4; Tr. 1902, ss. 10, 38; J. 1888, s. 36.

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holds generally, though in New South Wales and Trinidad-Tobago the leasehold ownership, if the fee simple be also registered, cannot appear on a separate register but only as an interest in or incumbrance upon the registered freehold. In four—Manitoba, Saskatchewan, Alberta, North-West Territories[3]—authority for the initial registration of leaseholds is implied in the use of the phrase "any estate or interest." In the other six jurisdictions—Queensland, Tasmania, Fiji, British Columbia, British Honduras, Leeward Islands—when leaseholds are referred to, it is on the assumption that the land has already been placed on the register. In British Honduras "lease" is not mentioned in the statute, though there can hardly be any doubt as to the right to create a lease and register it as an interest in the land. In British Columbia [4] leases are referred to as registrable incumbrances. In Tasmania [5] a separate register may be opened for certain leases. The Queensland and Fiji [6] statutes have merely the provisions for leases of registered land common to other statutes of the Australasian type, and in the Leeward Islands [7] the provisions are very similar.

The wide definition of "land" in most of the statutes—usually including all hereditaments corporeal and incorporeal—would ordinarily include an undivided share in land, as an interest that admitted of initial registration. In many of the statutes, however, express provision on this point is made. In three—England, Ireland. British Columbia [8]—undivided shares are, expressly or by implication from the definition of "land," allowed to be brought on to the register without the concurrence of co-owners. It is obvious that the initial registration of an undivided share in land is for many practical purposes the same thing as the registration of the entirety, and it is possible that the intention of the British Columbia enactment (s. 18) is to have the entirety placed on the register at the instance of one co-owner only. In eight jurisdictions—New South Wales, Queensland, South Australia, Tasmania, New Zealand, Ontario, Manitoba, Trinidad-Tobago [9]—the initial

[3] M. 1913, s. 28; Sas. 1917, s. 31: Al. 1906, ss. 26 (5), 27; Can. 1906, ss. 54, 55. It has been held that a lease from the Crown entitles the grantee to initial registration: *In re Land Titles Act* (1913) 24 West. R. 385 (Al.), under Al. 1906, s. 26 (1).

[4] B C. 1911, ss. 20A, 43, 149.

[5] Tas. 1862, s. 32: 1886, s. 12: 1893, ss. 8 10.

[6] Q. 1861. s. 52 *et seq.*: Fi. 1876 (1906), s. 49 *et seq.*

[7] L. Is. 1886 (1914), ss 56-58, 68-70.

[8] Eng. 1875, s. 82, and 1897, ss. 14, 24; I. 1891, ss. 64, 95; B. C. 1911, s. 18.

[9] N. S. W. 1900, s. 14 (3): Q. 1861, s. 16: S. A. 1886, s. 28: Tas. 1863 s. 4; N. Z. 1915, s. 20 (2); On. 1914, s. 96; M. 1913, s. 35; Tr. 1902, s. 11.

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registration of undivided shares separately is expressly forbidden, and in Victoria and Western Australia [10] this prohibition seems to be implied, and still more strongly implied in Leeward Islands.[11]

In some jurisdictions mines are included by express words in a definition clause, or by implication in "land," and no separate provision is made with regard to them. In others mines are expressly excluded from land and intended to be dealt with separately. In others again mines are usually included in land unless actually severed from the surface, and provision is made for their separate registration when necessary. "Mines" are expressly included in "land" by definition clauses in the following jurisdictions: New South Wales, Queensland, Tasmania, Papua, New Zealand, Fiji, Manitoba, Saskatchewan, Alberta, North-West Territories, British Columbia, Trinidad-Tobago;[12] but sometimes the same statute contains an enactment expressly excluding mines in certain cases, and instances of this occur in Alberta and British Columbia.[13] In the following seven jurisdictions the definition clause by implication includes mines in "land": South Australia, Victoria, Western Australia, British Honduras, Jamaica, Leeward Islands, Federated Malay States.[14] In Ireland and Ontario [15] registration in respect of the land generally does not ipso facto give title to the mines, and these must be the subject of distinct registration. In England land [16] primâ facie includes the mines, but express provision is made for their separate registration when necessary.

The statutory definitions of "land" (already referred to) expressly include all hereditaments "corporeal and incorporeal" in seventeen jurisdictions: England, all nine Australasian, Manitoba, Saskatchewan, Alberta, North-West Territories, British Honduras, Trinidad-Tobago, Jamaica. British Columbia includes all "hereditaments" without saying "corporeal." Ontario expressly provides for the initial registration of incorporeal hereditaments,

[10] V. 1915, s. 18; W. A. 1893, s. 20.

[11] L. Is. 1886 (1914), s. 12. But an instance of the registration of an undivided share occurs in *In re Smith* [1916] 2 Ch. 206.

[12] N. S. W. 1900, s. 3; Q. 1861, s. 3; Tas. 1862, s. 3; P. 1913, s. 5; N. Z. 1915, s. 2; Fi. 1876 (1906) s. 2; M. 1913, s. 2; Sas. 1917, s. 2; Al. 1906, s. 2; Can. 1906, s. 2; B. C. 1911, s. 2; Tr. 1902, s. 2. Of course mines may be dealt with apart from the surface; an illustration is *Taitapu Gold Estates* v. *Prowse* [1916] N. Z. R. 825.

[13] Al. 1906 s. 126 (2); B. C. 1911, s. 17.

[14] S. A. 1886, s. 3; V. 1915, s. 4; W. A. 1893, s. 4; B. H. 1914, s. 1; J. 1888, s. 2; L. Is. 1886 (1914) sch. def. "land"; F. M. S. 1911, s. 2.

[15] I. 1891, s. 48; On. 1914, ss. 93, 94.

[16] Eng. 1875, ss. 18, 82; 1897, s. 24. See Own. & Inc. 48, 109, 279, 296, 370.

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and this is also done in England. In Ireland the definition of "land" is "all corporeal hereditaments, but no other hereditaments," the initial registration of incorporeal hereditaments otherwise than as a "burden" on land being thus impliedly forbidden. In Leeward Islands and Federated Malay States the actual language of the statutes throws no light on the question whether incorporeal hereditaments are intended to be the subject of initial registration apart from the land itself. The implication appears to be (particularly as to Leeward Islands) that incorporeal rights are not intended to be registered separately. In British Columbia "hereditaments" would seem to include incorporeal hereditaments, and if so, incorporeal hereditaments could be the subject of separate initial registration.

England, Ireland and Ontario are the only jurisdictions in which provision on this subject has been made, either expressly allowing or pointedly forbidding the initial registration separately of incorporeal hereditaments.

The scheme of the system in Ireland is that incorporeal rights should be placed on the register as merely incumbrances or "burdens" upon land, and not as substantive hereditaments—"this being part of the essential framework of the system"; hence the statutory definition expressly excludes all other hereditaments than corporeal, though incorporeal rights could apparently be placed on the subsidiary registers.[17]

In England express provision is made in the 1875 Act for the initial registration of incorporeal hereditaments as distinct subjects of property, and reliance on the wide definition in the 1897 Act is not necessary.[18]

In Ontario initial registration may be had for "any incorporeal hereditament enjoyed in gross"; provision is also made for registration of easements over unregistered land and appurtenant to registered land, and over registered land and appurtenant to unregistered land.[19]

The latter part (sub-ss. 2, 3) of On. 1914, s. 93, is not derived from the English Act of 1875, and there appears to be no other enactment precisely corresponding to it in any other jurisdiction. In six of the Australasian systems—Queensland, South Australia,

[17] I. 1891, ss. 54, 95. The words quoted are those of Madden J. in *In re Keogh and Kettle* [1896] 1 I. R. 285.

[18] Eng. 1875, s. 82, and 1897, s. 24. See Own. & Inc. 48, 279, 370.

[19] On. 1914, ss. 13 (4, 5), 93. Sub-s. 1 of s. 93 is framed on Eng. 1875, s. 82, and the words "enjoyed in gross," which occur in both sections, have in England been repealed by Eng. 1897, sch. 1.

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Tasmania, Victoria, Western Australia, and Papua[20] — provision is made for the separate registration of easements, and for the registration of land having appurtenant to it an easement over land which may be unregistered.[21]

Apart from the legislation just referred to, there seems no reason on principle why an incorporeal hereditament should not be the subject of initial registration, notwithstanding that the land out of which it issued, or to which it was attached, is not registered land. The case of a rent-charge has been suggested as illustrating this.[22]

2. With reference to the personality of the owner of land or other person seeking initial registration, such a person may be alternatively: (i) The Crown or a private person; (ii) A subject of the Crown or an alien; (iii) A natural person or a corporation; (iv) An owner with limited interest or a full owner; (v) A trustee or a beneficial owner; (vi) A legal or an equitable owner, or a person with a mere power of disposition or appointment; (vii) A person of full capacity, or one under some disability.

i. Notwithstanding the technical difference between the title of the Crown and the title of a private person, the Sovereign is treated in the registration statutes substantially in the same way, with regard to the ownership of land, as a private person, though with some difference in procedure. The initial registration of the Crown is expressly provided for in Ireland, Ontario, and Manitoba, and perhaps impliedly in England.[23] In England and Ireland it is contemplated that a public officer or body, or person appointed under the sign manual, shall represent the Crown on the register. The Ontario enactment, after providing for the initial registration of an owner in fee simple or his nominee, proceeds:

> The Attorney-General for Canada, or the Attorney-General for Ontario, may apply in like manner in respect to the title of the Crown to any land; and the practice and procedure upon the application shall be the same as in ordinary cases.

[20] Q. 1877, s. 28; S. A. 1886, s. 81; Tas. 1886, ss. 26, 28; V. 1915 ss. 68, 70; W. A. 1909, s. 15; P. 1913, s. 72.

[21] *Ex p. Metropolitan Build. Soc.* (1885) 10 V. L. R. L. 361, overruling previous cases.

[22] *Ex p. Cuningham* (1877) 3 V. L. R. 199 205; *In re Keogh and Kettle* [1896] 1 I. R. 285, where "a rent issuing out of land" is selected as typical, incorporeal hereditaments being expressly excluded from registrable "land" in Ireland.

[23] I. 1891, s. 78; On 1914, s. 6 (3); M. 1913, s. 32; Eng. 1875, s. 65. The opinion expressed in Own. & Inc. 39, 49, 50, that Crown land cannot be the subject of initial registration in England, must be modified.

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Most of the other references in the statutes to the registration of the Crown as owner of land assume that the land is already registered.[24]

In most jurisdictions the registrar is expressly authorized to enter caveats for the protection of land belonging to the Crown and already on the register.[25] There is also an implied authority for the law officers of the Crown to enter caveats on its behalf against initial registration,[26] and the Australian cases as to this seem applicable in other jurisdictions; in England and Ireland the sections already cited also authorize the lodging of cautions.

The general conclusion is that the Crown can in all jurisdictions be placed on the register as owner of land, and can make application for initial registration when such a course seems advisable. Land vested in a public officer or body is in much the same position as land vested in ordinary private persons, though the procedure may sometimes be adopted which is appropriate to land vested directly in the Crown.

ii. An alien who has the right to own land in any particular jurisdiction could hardly be held not to be entitled to apply for and obtain initial registration. The subject of the rights of aliens to own land is a question into which it is unnecessary to enter in any detail here. The British Nationality and Status of Aliens Acts 1914 and 1918 must now be taken into account in considering the position of aliens in the Empire.[27]

iii. As in the case of an alien, a corporation that can own land can hardly be denied the right of initial registration. Conversely it would seem clear that a corporation not entitled to own land could not take advantage of the registration statutes to obtain a title to land. This was so held in British Columbia by a court

[24] N. S. W. 1900, s. 49; Tas. 1886, s. 23; W. A. 1896. s. 6; N. Z. 1915, s. 88(2); B. C. 1911, s. 58; Sas. 1917, ss. 88, 89; Al. 1906, ss 128, 130; Tr. 1902, s. 94, and 1914, s. 2; Ontario, Town Sites Act (R. S. 1914, c. 34).

[25] N. S. W. 1900, s. 12; Q. 1861, s. 11; Tas. 1862, s. 11; V. 1915. s. 233; W. A. 1893, s. 188; P. 1913, s. 15; N. Z. 1915, s. 183; Fi. 1876 (1906) s. 108; M. 1913, s. 54; Al. 1906, s. 100; B. C. 1911, s. 62A; Tr. 1902. s. 8; J. 1888, s. 11; F. M. S. 1911, s. 79 (referring to "Ruler of the State"). These enactments do not apply to caveats against initial registration: *In re Walker* (1890) 11 N. S. W. 369; see next note.

[26] *Atty.-Gen.* v. *Hoggan* (1877) 3 V. L. R. 111; *In re Walker, supra; Bank of Australasia* v. *Atty.-Gen.* (1894) 15 N. S. W. 256.

[27] Australasian legislation is referred to in Aust. Torr. Syst. 734; the Aliens Act now in force in New Zealand is that of 1908 (No. 5). and to the list in note 32 must be added "Papua: Aliens Ordinance 1911 (No. 26)." As illustrating possible difficulties, reference may also be made to *De Britt* v. *Carr* (1911) 13 C. L. R. 114, and to s. 241 of the New South Wales Crown Lands Consolidation Act 1913 (No. 7).

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of first instance, but the decision was reversed on appeal, the report unfortunately being silent as to the reasons for the reversal.[28] In the case referred to the company was in one sense "foreign," being an English company not registered locally. It is not within the scope of the present book to deal further with this question here;[29] the question of the title gained by a corporation when de facto registered will have to be considered later on.

iv. The applicant may be a "limited" or a "full" owner, by "limited" being meant having less than the fee simple or other complete property in the land.[30] The typical limited owner here referred to is a tenant for life. The question of terms of years or leaseholds has been dealt with from another point of view (*ante*, p. 24).

In some jurisdictions—Papua, Fiji, Federated Malay States, British Honduras, Leeward Islands—no provision is made for initial registration at the instance of limited owners.

In England, Ireland, and Ontario[31] a tenant for life can only apply for initial registration of land if he has a power of disposition or sale over the fee simple, this being often conferred by the Settled Land Acts or Settled Estate Acts. It is apparently contemplated in Ontario that an applicant-tenant for life may be registered as owner of the fee simple. In England and Ireland the statutes contemplate the tenant for life being registered as owner, but perhaps not of the fee simple, and the registered estate of such an applicant is anomalous. The consent of other persons interested in the land may be required under certain circumstances, where an application for initial registration as owner is made by a tenant for life.

In six jurisdictions—New South Wales, South Australia, Tasmania, New Zealand, British Columbia, Trinidad-Tobago[32]—all the persons collectively entitled to the fee simple must concur in or consent to the application. If a tenant for life were registered as full owner it would be by arrangement with other persons inter-

[28] *Exp. New Vancouver Coal Co.* (1890) 2 B. C. R. 8; 9 B. C. R. 571.

[29] See Aust. Torr Syst. 732, for some observations on corporations in Australasia. See Own. & Inc. 57 for references to the English Acts and Rules.

[30] The expressions "full" and "limited" owner of registered land occur only in the Irish Act, but they are adopted here for general use as being extremely convenient. A "limited" owner of settled land is often referred to in English statutes unconnected with registration of title.

[31] Eng. 1875, ss. 5, 68, and 1897, s. 6; I. 1891, ss. 28, 71; On. 1914, ss. 6, 7. See Own. & Inc. 86, 146, 213.

[32] N. S. W. 1900, s. 14; S. A. 1886, s. 27; Tas. 1863, s. 4; N. Z. 1915, s. 20; B. C. 1911, ss. 14, 18, 53; Tr. 1902 s. 10.

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ested, and his estate would be nothing less than the fee simple. But one person might of course be registered as a limited owner, the interests in remainder being also duly entered on the register.[33] In other jurisdictions land can be registered initially on the application of persons who do not amongst them own the complete fee simple. In Queensland, and perhaps in Alberta and North-West Territories,[34] a tenant for life is empowered to obtain initial registration without concurrence of other persons interested. In Western Australia and Jamaica[35] the concurrence of the owner of a "vested estate of inheritance" is essential to the life tenant's application, and this estate of inheritance might of course be a fee tail. So in Victoria,[36] though there "a tenant for life within the meaning of the Settled Estates and Settled Lands Act 1915" may also apply; but the trustees of the settlement must consent and be registered as owners. With reference to applications by tenants-in-tail, in Victoria estates tail cannot now (since 1885) be created,[37] and in Jamaica a tenant-in-tail will not be placed on the register, either as entitled to the fee simple or otherwise, even though he may be a person who can "dispose of the fee simple."[38]

In the jurisdictions above referred to it is the complete fee simple that is the subject of registration, notwithstanding that in come cases the applicant may not be the owner in fee. In Manitoba, Saskatchewan, Alberta, and North-West Territories,[39] the statutes expressly refer to the registration (in Alberta and North-West Territories) of the applicant's life estate, and (in all four) his "estate or interest." These enactments may possibly be construed as authorizing the registration of the applicant's interest (when less than the fee simple) only; if so, they will constitute an exception to the general rule that the initial registration of a limited owner brings the land or the whole fee simple (apart from the question of leaseholds) on to the register. But the construction is not clear.

[33] An illustration of an application by tenant-in-tail is *In re De Lauret* (1909) 10 S. R. (N. S. W.) 240.

[34] Q. 1861. s. 16. and see ss. 26, 36-39: Al. 1906 s. 26 (5); Can. 1906. s. 54. The construction of the two latter enactments is difficult; they may possibly refer only to the case of life estates in land already on the register.

[35] W. A. 1893. s. 20: J. 1888. s. 19. An illustration is *Chapman* v. *Robertson* (1887) 13 V. L. R. 682.

[36] V. 1915, s. 18.

[37] Real Property Act 1915. s. 62, replacing the section (s. 108) printed in Anst. Torr. Syst. 575.

[38] *In re Weatherspoon and Bayne's Application* (Jamaica, 1908) unreported.

[39] M. 1913. s. 28; Sas. 1917, s. 31; Al. 1906, ss. 26 (5), 27; Can. 1906, ss. 54, 55.

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v. Applicants (where an application is necessary) may be trustees, or may be beneficially entitled. The trustees of course may have only an equitable estate, and the beneficial owner may have a legal estate—this distinction is not here in question. So far as the forms and procedure of initial registration are concerned, the question whether an applicant is a trustee or not is only material in eleven jurisdictions—England, Ontario, the seven Australasian jurisdictions in which an application is necessary, Trinidad-Tobago, and Jamaica. In no other system is any distinction made between the application of a trustee and of a person beneficially entitled.

In England and Ontario [40] trustees for sale may apply to be registered, with the consent of the persons (if any) whose consent is necessary for the sale. In the absence of a power to sell, an owner not entitled beneficially could only obtain registration by consent of all persons who were entitled beneficially. This of course would not apply in a case where persons in whom the fee simple was vested were in fact trustees, but the trust was not disclosed on the title.

In Victoria, Western Australia, and Jamaica,[41] "trustees for sale of the fee simple" may apply, but only with the consent of those whose consent to sale is necessary. It has however been held in Victoria that trustees without power of sale may be "owners of the fee simple either at law or in equity," under another clause of the same enactment, and as such may be entitled to apply for initial registration without any consent from beneficiaries.[42] But trustees will nevertheless be personally liable for the expense incurred, if they obtain registration improvidently.[43]

In the remaining six jurisdictions the enactments are drafted somewhat differently, the clause relating to trustees being in the form of a proviso to that giving authority to fee simple owners to apply, with the result that the Victorian decision above referred to is inapplicable. In South Australia,[44] when "trustees seised in fee simple have no power to sell," the consent of all persons beneficially entitled is required. In New South Wales, Queensland, Tasmania, New Zealand, and Trinidad-Tobago,[45] when trustees have "no express power" of sale, consent of beneficiaries is also required: if

[40] Eng. 1875, s. 68; On. 1914, s. 7. See Br. & Sh. 211, 212.
[41] V. 1915, s. 18; W. A. 1893, s. 20; J. 1888, s. 19.
[42] *In re Benn and Grice* (1886) 12 V. L. R. 366.
[43] *Crout* v. *Beissel* [1909] V. L. R. 207.
[44] S. A. 1886, s. 27.
[45] N. S. W. 1900, s. 14; Q. 1861, s. 16; Tas. 1863, s. 4; N. Z. 1915, s. 20; Tr. 1902, s. 10.

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such a trustee is improperly registered as sole owner, a purchaser from him will not necessarily get a bad title though put on enquiry.[46] Such an "express" power may be conferred by a private Act of Parliament subsequently to the creation of the trust.[47] But an administrator is not a trustee entitled to make application without consent under these enactments.[48]

vi. Applicants for initial registration may have: (*a*) legal ownership of the land; (*b*) equitable ownership, or a right to have the legal interest; (*c*) a power to dispose of the land, with or without any actual ownership. Some statutes make no reference to power, some permit one of the above alternatives to legal ownership, and others both alternatives.

In British Columbia and Leeward Islands no special mention is made of legal or equitable ownership or power of disposition. In British Honduras merely equitable ownership is apparently not sufficient, it being contemplated that the applicant shall have the legal interest.[49]

In seven jurisdictions one alternative only is offered. In Manitoba, Saskatchewan, Alberta, and North-West Territories, an applicant may be the owner of any "estate or interest in land, whether legal or equitable"; in Ireland the only case of other than legal ownership expressly mentioned is the case of a purchaser who has not yet received his conveyance, but it is also implied that tenants for life under the Settled Land Acts may apply.[50] The corresponding provisions in the Queensland and Tasmanian statutes are framed more elaborately, and (in Queensland particularly) this sufficiency of equitable interests is sometimes only implied, and rests partly on judicial decision.[51]

In the remaining nine jurisdictions two alternatives are offered —an equitable interest and a power of disposition. England and Ontario[52] constitute one distinct type, and the seven others

[46] *George* v. *Aust. Mut. Prov. Soc.* (1888) 4 N. Z. S. C. 165.

[47] *Ex p. Pennington* (1875) 13 S. C. (N. S. W.) 305.

[48] *Public Trustee* v. *Arthur* [1892] S. A. R. 59; *In re McCarthy* (1877) 11 S. A. R. 39; *In re Hutchinson* (1910) 27 W. N. (N. S. W.) 164.

[49] B. H. 1914, ss. 16, 40. But by s. 10 a "safe-holding title" is sufficient.

[50] M. 1913, s. 28; Sas. 1917, s. 31; Al. 1906, s. 27; Can. 1906, s. 55; I. 1891, ss. 28 30 (7).

[51] Q. 1861, s. 16; *In re Eaton* (1879) 1 Q. L. J. Suppl. 9; Tas. 1863, s. 4 (fee simple "either at law or in equity"). And see Aust. Torr. Syst. 725, 727.

[52] Eng. 1875, ss. 5, 11, 68; On. 1914, ss. 6, 7, 16. And see Own. & Inc. 50, 53.

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another, viz. New South Wales, South Australia, Victoria, Western Australia, New Zealand, Trinidad-Tobago, and Jamaica.[53] In all nine, although the fee simple is usually (but not in every case) stated to be "at law or in equity," the sufficiency of an equitable interest when less than the fee, and sometimes of an equitable fee simple, seems clearly implied; decided cases support this view, as also do occasional instances of enactments in general statutes conferring the right to initial registration on persons who have not complete legal ownership.[54]

a. Legal ownership, from the point of view of the applicant, may be of two kinds—ownership existing by virtue of a chain of title evidenced by documents, and ownership existing by virtue of mere length of possession. On the production of the documents constituting the chain of title, a court of law will unhesitatingly declare that the person in whom the legal interest is shewn to be vested is the legal owner. But courts administering English law have up to the present time had considerable hesitation in bestowing the name of legal owner on a person who can—in lieu of proving his own title affirmatively—do no more than prove the negation of title in someone else. The following passage in a judgment of the Privy Council[55] represents the highwater mark in judicial assertion by an appellate court of the affirmative side of a title by possession:

> It cannot be disputed that a person in possession of land in the assumed character of owner, and exercising peaceably the ordinary rights of ownership, has a perfectly good title against all the world but the rightful owner, and if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.

Apparently there is no reported case in which it is actually decided in so many words that the title by possession thus acquired is a legal estate in fee simple. But the established practice in the Australasian jurisdictions is to treat a title by possession under the

[53] N. S. W. 1900, s. 14; S. A. 1886, s. 27; V. 1915, ss. 18, 38; W. A. 1893, ss. 20 39; N. Z. 1915, s. 20; Tr. 1902, s. 10; J. 1888, ss. 19, 36.

[54] See Q. 1877, s. 10, where mere concurrence of a legal owner is made sufficient, without formal conveyance of his interest. In *In re De Lauret* (1909, 10 S. R. (N. S. W.) 240) the applicant's title was an equitable estate tail. New South Wales—Forfeiture and Validation of Leases Act 1905 (No. 8), s. 7 (3), right to a lease under imperfectly executed power.

[55] *Perry* v. *Clissold* [1907] A. C. 73, 79. Similar language is used, substituting "indefeasible" for "absolute," in *In re Eaton* (1879) 1 Q. L. J. Suppl. 9, 11.

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Limitation Acts as "a fee simple in possession," both at law and in equity, for purposes of initial registration, whether put forward by an applicant or a caveator who opposes the application.[56] So in Ireland.[57] In Victoria and Western Australia it has been assumed by the legislature, rather than enacted, that a title to land on the register can be acquired by adverse possession under Limitation Acts.[58] And it has now been expressly laid down in two Canadian jurisdictions that the ownership, in respect of which a person claiming by adverse possession applies for initial registration, may be properly described as an estate in fee simple.[59] This fee simple is, as a matter of fact, treated for purposes of initial registration as a complete legal estate, and not as an equitable estate apologizing for the absence of the legal interest. Only in one jurisdiction, however, does this seem to have been the subject of definite enactment; in the Leeward Islands[60] an applicant who has been in possession for twelve years is "for the purpose of this Act" to be "taken as the owner thereof, and the certificate of title shall issue to him accordingly."

In most jurisdictions a fee simple title by possession may thus be acquired against the Crown as well as against a private person. The Crown Suits Act 1769 (the Nullum Tempus Act) is in force in the oversea dominions, unless some express legislation declares the contrary,[61] and it has now been held that the effect of 60 years adverse possession is to extinguish the title of the Crown, just as the title of a private person is extinguished by virtue of other Limitation Acts.[62] Where the statutory qualification for the right to initial registration is simply ownership "in fee simple," or

[56] *In re Eaton, supra; Ex p. O'Neill* (1897) 7 Q. L. J. 155; *In re Cooper* (1904) 4 S. R. (N. S. W.) 470; *In re Spencer*, ib. 471; *In re Robertson* (1907) 7 S. R. (N. S. W.) 474.

[57] Bro. & Gl. 167; *In re Hayden* [1904] 1 I. R. 1 (same principle as to leasehold).

[58] V. 1915, s. 87; W. A. 1893, s. 222; *Tuckett* v. *Brice* [1917] V. L. R. 36, 60.

[59] *Re Anderton* (1908) 8 West. R. 319 (Al.), where the authorities are fully set out; *Bradshaw* v. *Patterson* (1911) 18 West. R. 402 (Sas.). See also Aust. Torr. Syst. 721, 722, 770, cited with approval in *Re Anderton*. The theoretical side of the law of ownership of land is dealt with in 25 L. Q. R. 178 (1909)—"The effect of Tenure on Real Property Law."

[60] L. Is. 1886 (1914), s. 14. And see as to Jamaica—J. 1888, s. 22, *post*, p. 54.

[61] *Att.-Gen.* v. *Love* [1898] A. C. 679, New South Wales; *Riddiford* v. *Rex* [1905] A. C. 147, New Zealand; *Emmerson* v. *Maddison* [1906] A. C. 569, New Brunswick; *Att.-Gen.* v. *Bristowe* (1880) 6 A. C. 143, British Honduras. In Victoria the title of the Crown to land cannot now (since 1907) be affected by adverse possession: Real Property Act 1915 (No. 2719) s. 17.

[62] *Walker* v. *Smith* (1907) 7 S. R. (N. S. W.) 400 (where the title to the land the subject of *Att.-Gen.* v. *Love* was forced on a purchaser), follg. *Tuthill* v. *Rogers* (1844) 1 J. & L. 36. 68 R. R. 223.

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ownership of "any estate or interest" in land—as in the Canadian systems—there seems to be no reason why a fee simple or other estate acquired by adverse possession against the Crown should not be sufficient qualification, as in the case of adverse possession against private persons. In some statutes, too, the existence of a title otherwise than by actual grant from the Crown seems to be implied, as in Saskatchewan, Alberta, North-West Territories, Trinidad-Tobago.[63] In the Australasian systems a difficulty is caused by enactments to the effect that it is only land "alienated from the Crown" that can be the subject of initial registration. Although "alienate" does not necessarily mean "grant,"[64] the necessity for an actual grant by the Crown seems to be assumed in these enactments. But if this is so, a title might even have been judicially declared to be good and yet remain unregistrable.[65]

The applicant may, in the majority of the systems, have the initial registration effected in the name of a nominee.[66] The jurisdictions in which no reference to this is made are: Ireland, British Columbia, British Honduras, Leeward Islands. In England and Ontario the applicant is expressly permitted to "have registered in his stead" a "nominee"; the only other jurisdiction in which the word "nominee" is used seems to be Jamaica, and the reference is incidental only.[67] In nine jurisdictions—New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, New Zealand, Trinidad-Tobago, and Jamaica,[68] it is enacted that the certificate of title on initial registration may be issued to such person as the applicant directs; a conveyance of the land by the applicant to another person pending the registration will be treated as a direction to register the latter as owner.[69] In Manitoba[70] the direction to register another in place of the

[63] Al. 1906, s. 27, and Can. 1906, s. 55, both referring to land "which otherwise had prior to that date passed from the Crown." and so Sas. 1909, s. 49 (not re-enacted in Sas. 1917, s. 31); Tr. 1902, s. 10, "all other lands within the colony."

[64] The meaning of "alienation" from the Crown was much discussed in *Hegarty* v. *Ellis* and *Higgins* v. *Berry* (1908) 6 C. L. R. 264, 618. It was held to mean formal grant in fee in *Re Irish* (1888) 2 Man. R. 361.

[65] *Walker* v. *Smith* (*supra*) is an illustration of such a title judicially held good.

[66] Illustrations are: *Kemp* v. *Douglas* (1875) 1 V. L. R. 92; *Fotheringham* v. *Archer* (1868) 5 W. W. & a'B. L. 95; *Hay* v. *Nixon* (1891) 7 Man. R. 579.

[67] Eng. 1875, ss. 5, 11; On. 1914, ss. 6, 16; J. 1888, ss. 22, 25.

[68] N. S. W. 1900, s. 17; Q. 1861, s. 18; S. A. 1886, s. 37; Tas. 1862, s. 20; V. 1915, ss. 24, 32; W. A. 1893, ss. 25, 33; N. Z. 1915, ss. 24, 27; Tr. 1902, s. 14; J. 1888, s. 35.

[69] *Ex p. Murray* [1913] V. L. R. 546. Apparently this would not be so in East Africa: *Macmillan* v. *Att.-Gen.* (1912) 4 Ea. Af. R. 120. In *Park* v. *Dunn* [1916] N. Z. R. 761, the applicant in effect parted with his interest by making a declaration of trust. [70] M. 1913, s. 38.

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applicant operates, by express enactment, to transfer to the nominee "all the estate or interest whether legal or equitable" of the applicant. In Saskatchewan, Alberta, and North-West Territories,[71] the authority for registration of a nominee is only implied by being referred to in the forms in the schedules to the statutes.

The substitution of a nominee for the applicant on the register is in effect, even where not so enacted (as is expressly done in Manitoba) a transfer of the property to the nominee, and may be liable to duty under Stamp Acts.[72]

The preceding observations apply to the case of a beneficial owner. But the legal ownership may be vested in the applicant by way of mortgage only. In that case the consent of the mortgagor to the application would usually be required, unless the application were made merely in pursuance of a sale under the mortgage. The majority of the statutes enact that a mortgagee can only apply in exercise of his power of sale, it being in some cases also expressly provided that the person to be registered as owner must be the purchaser; such a provision seems to be implied in all such cases.

In England a mortgagee "may authorize the purchaser to make an application to be registered," and this has given rise to difficulties which are avoided in the corresponding Ontario enactment.[73] In Ontario a mortgagee cannot "himself apply to be registered," but, if he has a power of sale, can either authorize a purchaser from himself to apply for registration, or himself apply to have the owner of the equity of redemption registered.

In New South Wales, Queensland, South Australia, Tasmania, and New Zealand,[74] the mortgagee can only apply in exercise of his power of sale—it being implied that the registration is to be in the name of the purchaser. So in Victoria, Western Australia, Trinidad-Tobago, and Jamaica,[75] the mortgagee can only apply in exercise of his power of sale, but it is expressly added that the certificate of title is to issue to the purchaser. These cases of applications by mortgagees are merely variations of applications for the registration of a nominee, already referred to.

In Manitoba, Saskatchewan, Alberta, and North-West Territories, a mortgagee may apply independently of the mortgagor by

[71] Sas. 1917. sch. 2 f. B; Al. 1906, sch. f. F; Can. 1906, sch. f. F.

[72] See *Exp. Clissold* (1884) 5 N. S. W. 176, where the actual applicant was the purchaser.

[73] Eng. 1875 s. 68; On. 1914, s. 7. See Br. & Sh. 211.

[74] N. S. W 1900. s. 14; Q. 1861, s. 16; S. A. 1886. s. 28; Tas. 1863, s. 4; N. Z. 1915. s. 20. An illustration is *In re Davis* (1867) 1 S. A. R 67.

[75] V. 1915, s. 18; W. A. 1893, s. 20; Tr. 1902. s. 11; J. 1888, s. 19.

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virtue of having an "estate or interest in land," and in Manitoba the "application may in the discretion of the district registrar be made by the mortgagee or incumbrancee." [76]

In Ireland, British Columbia, British Honduras, and Leeward Islands, nothing is said as to initial applications by mortgagees, except that in Ireland and British Columbia [77] a mortgagee might apply for his security to be entered on one of the subsidiary registers set up by the statutes.

b. There are several cases in which an applicant may have good reason for offering an equitable title only. The bare legal estate may be outstanding, and the whole beneficial interest in the applicant.[78] On the other hand, the land may be subject to mortgage and the legal estate vested in the mortgagee. The land is then registered with the mortgage entered as an incumbrance on it, but in some jurisdictions the formal consent of the mortgagee is essential to the application, viz., New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, New Zealand, Trinidad-Tobago, Jamaica.[79] A mortgagee with the legal estate might have possession of the title deeds, whilst his right to recover the debt was barred by lapse of time. Whether his consent under such circumstances would be necessary seems not to have been decided, though the consent of a statute-barred equitable mortgagee by deposit has been held not to be necessary.[80]

Perhaps the most common case of an equitable title being offered is where the applicant has recently purchased the land and not yet received his conveyance. This, though believed to be a common case in nearly all jurisdictions, seems only to be expressly provided for in seven: England, Ireland, Ontario, New South Wales, Victoria, Western Australia, and Jamaica.[81] In England, Ireland, and Ontario, the application can only be made with the consent of the vendor. In New South Wales the vendor may also consent, but his consent is not required if the whole of the purchase money has been paid, and this would be the ordinary rule in other

[76] M. 1913, ss. 28, 122 (4); Sas. 1917, s. 31; Al. 1906, s. 27; Can. 1906, s. 55: *Bucknam* v. *Stewart* (1897) 11 Man. R. 491.

[77] I. 1891, s. 54; B. C. 1911. ss. 29, 104.

[78] Illustrations are: *In re Eaton* (1879) 1 Q. L. J. Suppl. 9. applicant held entitled to a vesting order; *In re De Lauret* (1909) 10 S. R. (N. S. W.) 240, equitable estate tail; *Tomlinson* v. *Cooper* (1908) Jamaica, unreported, gift without words of limitation, resembling *In re Oliver's Settlement* [1905] 1 Ch. 191.

[79] See notes 74 and 75, *ante*.

[80] *Barnet* v. *Williams* (1889) 15 V. L. R. 205.

[81] Eng. 1875, ss. 5, 11; I. 1891, s. 30 (7); On. 1914, ss. 6 (2), 16 (1); N. S. W. 1900, s. 14 (3); V. 1915, s. 45; W. A. 1893, s. 46; J. 1888, s. 39, and 1894, s. 1 (s. 35 of J. 1889 is repealed by J. 1900).

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jurisdictions. In Victoria, Western Australia, and Jamaica, the case of an ordinary purchaser is not thus expressly provided for, but only the case of a purchaser of the fee simple at a sale by the Court; the decree, confirmation of sale, and certificate of payment of purchase money, are made sufficient evidence of title. In Jamaica any purchaser may also (in the absence of stipulation) require his vendor to cause him to be registered, instead of making a conveyance of the land.

The application of a purchaser with the consent of his vendor is practically the same thing as the substitution of a nominee, already referred to (*ante*, p. 36). And—whether the application is made with the vendor's consent, or solely by virtue of the purchaser's equitable ownership after payment of purchase money and receiving possession—a transfer of property is effected which may be dutiable under Stamp Acts.[82]

An equitable title sufficient for initial registration is also constituted in some jurisdictions by documents evidencing payment for land purchased from the Crown, or authorizing the issue of grants from the Crown or their statutory substitutes.[83] The registration of these documents constitutes a kind of provisional registration of the land (it is styled "provisional registration" in New Zealand), and transactions can be registered pending the issue and registration of a formal grant.[84]

c. The jurisdictions in which a power of disposition is sufficient title for initial registration are: England, Ireland, Ontario, New South Wales, South Australia, Victoria, Western Australia, New Zealand, Trinidad-Tobago, and Jamaica. In Trinidad-Tobago[85] the power is "a general power of appointing by deed" the "fee simple in possession either at law or in equity." In other jurisdictions more than this one case is provided for.

[82] *Ex p. Clissold* (1884) 5 N. S. W. 176. Other instances of purchasers' applications are: *Roberts* v. *Balfour* (1892) 18 V. L. R. 140; *In re Salter* (1871) 2 V. R. L. 113. And see Br. & Sh. 6, 144, 224, 371; Own. & Inc. 52; Eng. 1903-8 Rules, r. 21. In New Zealand the question of stamp duty is expressly dealt with by statute: Stamp Duties Act 1908 (No. 182) s. 80, sch. 2 "Land transfer." So in Ireland: I. 1891, s. 80.

[83] Aust. Torr. Syst. 726; N. Z. 1915, ss. 10 19, 46 50, 239; Appx. II., and notes in Hutch. 49 *et seq.*; V. 1915. ss. 16, 77; Sas. 1917, s. 100; Al. 1906, s. 60 (2); Can. 1906, s. 95.

[84] Illustrations are: In Australia — *Fitzgerald* v. *Archer* (1864) 1 W. W. & a'B. L. 40; *Att.-Gen.* v. *O'Sullivan* (1878) 11 S. A. R. 90; *Donaldson* v. *Noble* (1888) 14 V. L. R. 1021, 1042. And see Aust. Torr. Syst. 727. Cases in Canada—*Re Irish* (1885) 2 Man. R. 361; *Re Canadian Pacific Ry.* (1899) 4 Terr. R. 227; *Re International Harvester Co.* (1909) 9 West. R. 680.

[85] Tr. 1902, s. 10.

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In England and Ontario [86] the applicant may either be "capable of disposing for his own benefit by way of sale" of freehold or leasehold land, or may be a "person having a power of selling land" as trustee or otherwise (excluding, in Ontario, a mortgagee). Applications by trustees and mortgagees have already been referred to (*ante*, pp. 32, 37). In Ireland [87] applicants with powers of disposition are not expressly mentioned, but it is impliedly enacted that a person with the powers of disposition conferred by the Settled Land Acts may apply for initial registration. In England the "power of selling land" conferred on a tenant for life by the Settled Land Acts enables a tenant for life to apply for initial registration under s. 68 of the 1875 Act. In Ontario the corresponding enactment (s. 7 of the 1914 Act) has not the same effect, since there is no legislation exactly like the Settled Land Acts.[88] The provisions of the English and Ontario statutes relating to powers of disposition "for his own benefit" will cover the case of a donee of a beneficial power of appointment.

In Victoria, Western Australia, and Jamaica,[89] the power is one "of appointing or disposing of" the fee simple, no restrictions being mentioned. Literally, this would include the case of a tenant for life with an express or a statutory power of sale, but in Victoria, Western Australia, and Jamaica, the case of a tenant for life is separately provided for, and it has accordingly been held in Western Australia that this clause does not include the case of a tenant for life or other person having any actual estate in the land, but is intended to apply only to persons who have merely a power without ownership, and only to those who have unconditional and unrestricted powers.[90]

In New South Wales and South Australia the power referred to is also one to appoint or dispose of the fee simple, but the application for initial registration is to be an exercise of the power; in New Zealand the power is one "to dispose of the fee simple," but any consent necessary to the exercise of the power must be given.[91] These provisions also appear to apply only to persons who have a power merely and no life estate or other ownership.[92]

vii. Persons under legal disability may apply for initial registration as well as those of full capacity. Coverture is rapidly ceas-

[86] Eng. 1875, ss. 5, 11, 68, and see 1897, s. 6; On. 1914, ss. 6, 7, 16.
[87] I. 1891. ss. 28, 71.
[88] The Settled Estates Act (R. S. 1914. c. 74) is modelled on the English Settled Estates Acts and not the Settled Land Acts.
[89] V. 1915, s. 18; W. A. 1893. s. 20; J. 1888, s. 19.
[90] *North* v. *Commr. of Titles* (1905) 7 W. A. R. 215.
[91] N. S. W. 1900. s. 14 (2); S. A. 1886, s. 27; N. Z. 1915, s. 20 (1).
[92] *North* v. *Commr. of Titles, supra.*

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ing, even under the general law, to be a disability in the proper sense of the word; the policy of the registration statutes is to regard a married woman as unmarried with respect to her separate property, and the husband's interest (if any) as merely a right of property in the land. In many jurisdictions no reference is made to married women being applicants for initial registration. In others there is, as in British Columbia and Leeward Islands,[93] only an implied reference in the directions for execution of documents by married women.

In Ontario[94] a married woman "shall for the purposes of this Act be deemed a feme sole." In most jurisdictions enactments modelled on the English Married Women's Property Acts are in force, and must be taken to override any general enactment on the subject contained in the registration statutes; in one jurisdiction (North-West Territories) such an enactment is actually placed in the registration statute itself, and in another (Ireland) the Married Women's Property Act is in effect incorporated in the registration statute.[95] Thus, in most jurisdictions the consent of the husband to the wife's application is only required when he has some interest in the land, that is, where the land is not her separate property. Queensland is an exception, and apparently also British Honduras.[96] The husband's consent is expressly made unnecessary where the land is the wife's separate property (sometimes also where she has a power of appointment) in the following jurisdictions: England, New South Wales, South Australia, Victoria, Western Australia, New Zealand, Trinidad-Tobago, and Jamaica.[97]

With respect to disabilities in the proper sense—infancy and lunacy, &c.—only in British Columbia and Leeward Islands is there no mention in the statutes of applications on behalf of infants and lunatics. In the seven Australasian jurisdictions which provide for voluntary applications, and in Manitoba, Trinidad-Tobago, and Jamaica, authority to make these applications is contained in the enactments authorizing initial applications generally. In England, Ireland, Ontario, Saskatchewan, Alberta, North-

[93] B. C. 1911, ss. 80, 81; L. Is. 1886 (1914) ss. 151, 152.

[94] On. 1914, s. 103.

[95] Can. 1906, s. 16; I. 1891, s. 73. As to the over-riding effect of M. W.P. Acts, see Aust. Torr. Syst. 731, 990; *Fraser* v. *Douglas* (1908) 40 Can. S. C. R. 384.

[96] Q. 1861, s. 16: B. H. 1914, s. 37. In Tasmania these words of the Queensland Act have been repealed: Tas. 1863, s. 4, and 1886, s. 37.

[97] Eng. 1875, s. 87; N. S. W. 1900, s. 14 (4); S. A. 1886, s. 28: V. 1915, s. 18; W. A. 1893, s. 20; N. Z. 1915, s. 20 (2); Tr. 1902, s. 11 (the M. W. P. statute being mentioned); J. 1888, s. 19.

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West Territories, and British Honduras,[98] authority is given by comprehensive enactments in the statutes or rules for the representation of infants and lunatics.

SECTION 2—PROCEDURE ON INITIAL REGISTRATION.

Initial registration is either compulsory or voluntary, and the "compulsion" may be either direct or indirect. But whether compulsory or voluntary, and whatever the method of compulsion, the registration consists of the same two operations—placing the land on the register, and declaring the title of the owner (*ante*, p. 24).

The registration may be said to be effected by direct compulsion when no application has to be made, or any action (other than a possible payment of fees) taken by the owner, but the land is simply placed on the register when completely vested in him.[1] Compulsory registration of this kind is provided for in some jurisdictions upon public land being vested in private persons, and upon private land being expropriated for public purposes.

Upon grant from the Crown or State (or the statutory equivalent of such a grant) land is thus compulsorily registered in all nine Australasian jurisdictions and in the following: Ontario (in certain districts), Manitoba, Saskatchewan, Alberta, North-West Territories, Trinidad-Tobago, Federated Malay States.[2] In Papua, Fiji, and Federated Malay States there is no other method of initial registration; all land on being granted by the Crown or State is at once registered without any application on the grantee's part. In South Australia, Victoria, Western Australia, Papua, New Zealand, Ontario, and Federated Malay States, the "grant" may be for a term of years as well as in fee, and even in the absence of express enactment a "grant" by the Crown for a term of years is registrable.[3] The system of provisional registration pending the issue of a grant from the Crown has been referred to in Section 1

[98] Eng. 1875, s. 88; I. 1891, ss. 74, 75, and 1910 O. 10; On. 1914, s. 104; Sas. 1917, s. 203; Al. 1906, s. 133; Can. 1906, s. 165; B. H. 1914, s. 38.

[1] Aust. Torr. Syst. 736; *Burns* v. *Registrar of Titles* [1912] V. L. R. 29.

[2] N. S. W. 1900, s. 13; Q. 1861, s. 15; S. A. 1886, ss. 26, 91-95; Tas. 1863, s. 3; V. 1915, s. 16; W. A. 1893, s. 18, and 1909, s. 3; P. 1913, s. 32; N. Z. 1915, ss. 10-18, and Land Act 1908 (No. 94) s. 90, and notes in Hutch. 49 *et seq.*; Fi. 1876 (1906) s. 9; On. 1914, ss. 159-162; M. 1913, s. 29; Sas. 1917 ss. 46-48; Al. 1906, s. 26; Can. 1906, ss. 49-53; Tr. 1902, s. 9; F. M. S. 1911, ss. 5, 27

[3] *In re Land Titles Act* (1913) 24 West. R. 385 (Al.). An instance of a Crown lease being under the registration statute at once is *Commercial Bank* v. *Carson* (1880) 6 V. L. R. 310, 315.

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in connexion with equitable interests as registrable initially (*ante*, p. 39).

Registration on expropriation for public purposes is provided for in the following jurisdictions: New South Wales, Victoria, Western Australia, New Zealand, Saskatchewan, Alberta,[4] and probably in some other jurisdictions similar provision is made by general legislation. So where disused roads or other public lands are appropriated for private use and vested in private owners,[5] the land is at once placed on the register without formal application.

Eliminating Papua, Fiji, and Federated Malay States—where all initial registration is compulsory—there remain nineteen jurisdictions in which initial registration is wholly or partially voluntary. In four of these it is wholly voluntary, no initial registration being directly compulsory: British Columbia, British Honduras, Jamaica, Leeward Islands. With respect to British Columbia, although the initial registration of land and its title is voluntary, the registration of instruments is indirectly enforced, a system of deed registration being combined with title registration.[6] In Jamaica,[7] in lieu of a grant from the Crown "it shall be sufficient for the Governor to issue directions to the registrar to register the proposed grantee as the proprietor of the land." This seems in practice to be taken as giving a grantee the choice of a registered or unregistered title. In Leeward Islands[8] this choice is expressly given.

In England and Ireland initial registration is in some cases indirectly compulsory, but otherwise voluntary. In thirteen jurisdictions the system of direct compulsion exists side by side with the voluntary system: New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, New Zealand, Ontario, Manitoba, Saskatchewan, Alberta, North-West Territories, Trinidad-Tobago.

What is meant by direct compulsion has already been explained. Indirect compulsion must now be referred to, as part of the system

[4] Illustrations are: New South Wales—Darling Harbour Land Titles Act 1907 (No. 10); Victoria—Local Government Act 1915 (No. 2686) ss. 338, 339; Western Australia—Public Works Act 1902 (No. 47) s. 23; New Zealand—Public Works Act 1908 (No. 160) s. 24; Sas. 1917, ss. 89, 90; Al. 1906, s. 26 (7). See *Tully* v. *Carterton* (*Borough*) (1905) 25 N. Z. R. 236.

[5] Aust. Torr. Syst. 738. New South Wales—Centenary Park Sale (Conveyancing) Act 1905 (No. 6); Victoria—V. 1915, s. 46, and Local Government Act 1915, ss. 480, 485; Alberta—Al. 1906, s. 26 (6).

[6] B. C. 1911, ss. 104, 105; *Howard* v. *Miller* [1915] A. C. 318 (ss. 104 and 105 being re-enactments of ss. 74 and 75 there referred to).

[7] J. 1889, s. 3. See Report of registrar of titles in Gazette of 21 May, 1914.

[8] L. Is. 1886 (1914) s. 7.

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of initial registration in England and Ireland. In England initial registration is "compulsory on sale" of land (freehold or leasehold) within certain areas, except incorporeal hereditaments, severed mines, some leaseholds and other interests; in Ireland it is "compulsory" when any land (freehold or leasehold) has at any time been sold and vested in a tenant-purchaser under the Irish Land Acts subject to a charge for instalments of purchase money; in these cases a purchaser does not, until registered as owner, acquire by his conveyance or grant (in England) the "legal estate" or (in Ireland) "any estate" in the land or lease.[9]

The procedure in England and Ireland for obtaining initial registration is not affected by any difference between compulsory and voluntary registration, but it is a matter of practical importance to a purchaser of unregistered land to know whether the land is subject to the compulsory enactments. The land may belong to the class of land that is compulsorily registrable, and yet may fall within one of the excepted cases. The English and Irish statutes differ on both these points. Compulsion in Ireland only applies to land purchased by tenants under the Land Acts and charged with instalments of purchase money,[10] and of that class only to corporeal hereditaments. A fee-farm rent conveyed by the owner to the tenant in fee-farm does not require initial registration.[11] In England the classes of land and the exceptions are more numerous, and the subject is dealt with in the special text-books.[12]

There are also differences between the English and Irish enactments with respect to the nature of the transaction that will make initial registration necessary. The penalty for non-registration is in each jurisdiction that the conveyance does not have its intended effect. In England it is only a "conveyance on sale" that, until the owner is registered, does not vest in him the "legal estate"; in Ireland "any conveyance" fails, until the owner is registered, to vest in him "any estate" in the land. The net spread by the Irish enactments is by far the wider. The difference between "legal estate" and "any estate" is particularly important. In England the conveyance of an interest other than the legal estate would not necessitate initial registration. In Ireland the conveyance of even an equitable interest would make it necessary for the purchaser to

[9] Eng. 1875, s. 11; 1897, ss. 20, 24 (1); 1903-8 Rules, rr. 68-70. I. 1891, ss 22, 25, 53, 95: and see Irish Land Act 1903 (3 Edw. 7, c. 37) ss. 49, 54, and 69 of which refer to registration of title.

[10] I. 1891, ss. 22, 53, 95.

[11] *In re Keogh and Kettle* [1896] 1 I. R. 285.

[12] Eng. 1875, s. 11 (am. 1897); 1897, ss. 20, 24 (1); 1903-8 Rules, rr. 68-70. Own. & Inc. 58-69. Br. & Sh. 337-343.

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apply for registration, since otherwise he would take no actual estate legal or equitable in the land.[13]

With the initial registration of land placed on the register by public authorities—direct compulsion—the owner of the land has little to do, except to pay any fees that may be due at the registry. There are, however, a few points in the final stage of voluntary registration that also apply to registration under direct compulsion. These concern: (1) The actual time of the registration taking effect; (2) The relation back of the registration in some cases; (3) Outstanding interests in persons other than the owner; (4) The issue of a duplicate document of title; (5) The statement on the register of an owner being under disabilities. These matters are dealt with in describing the final stage of initial registration upon a voluntary application.

The procedure in Jamaica and Leeward Islands [14] when a registered title is elected to be taken on grant from the Crown differs little from the compulsory registration just referred to.

The procedure on indirect compulsory registration in England and Ireland requires no special mention, since it is the same as on voluntary applications, though sometimes more troublesome by reason of the necessity for protecting the interests of persons other than the applicant himself. In Ireland the Land Commission may make the application on the owner's default in doing so, and notice of cases requiring compulsory registration is sent to the registry; the forms of application for initial registration also vary, according as the registration is compulsory or voluntary.[15]

The procedure for initial registration upon ordinary voluntary applications has now to be dealt with. As already stated (p. 43) there are nineteen jurisdictions in which this system prevails: England,[16] Ireland,[17] New South Wales, Queensland, South Australia,

[13] *In re Furlong and Bogan's Cont.* (1893) 31 L. R. I. 191; *Pim* v. *Coyle* [1907] 1 I. R. 330; *Mooney* v. *McMahon* [1911] 1 I. R. 125.

[14] J. 1889, s. 33; L. Is. 1886 (1914) s. 37.

[15] I. 1891, ss. 22, 23; 1910 O. 2, rr. 1-5, ff. 3, 4.

[16] In England application for initial registration may also be made by a County Council in virtue of s. 13 of the Small Holdings and Allotments Act 1908 (c. 36). This section re-enacts s. 19 of the Land Transfer Act 1897, and other sections re-enact the Small Holdings Act 1892. As to the latter Act and rules under it, see Br. & Sh. 540-559; Own. & Inc. 68, 72, 273.

[17] In Ireland the Small Dwellings Acquisition Act 1899 (c. 44) applies, as modified by s. 14, and by s. 15 a local authority is to effect initial registration in respect of property on which an advance is made. The section, however, makes the singular mistake of assuming that the Land Transfer Acts 1875 and 1897 apply to Ireland. The Orders and Rules of 1910 under the Act make the same mistake, since (O. 15) they refer to "absolute," "qualified" and "possessory" title, which are not provided for by the Local Registration of Title (Ireland) Act 1891.

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Tasmania, Victoria, Western Australia, New Zealand, Ontario, British Columbia, Manitoba, Saskatchewan, Alberta, North-West Territories, British Honduras, Trinidad-Tobago, Jamaica, Leeward Islands. In every one of these, except Manitoba, a form of application is prescribed by the statute itself or rules made under it. These forms are in substance identical, though different in detail. They contain a short statement of facts shewing the applicant's title and who is in possession, a request for the land to be placed on the register, and a claim to have the applicant or a nominee registered as owner. The formal application has usually to be verified by statutory declaration or affidavit, or by being attested by an official witness. No such verification is provided for in Manitoba or British Honduras; it is only required in England and Leeward Islands when a "possessory" title is applied for.

In England, Ireland, and Ontario,[18] the forms of application are prescribed by rules, and not in the statutes themselves. These forms do not refer so expressly to the entry of the land on the register (though this is done by one of the Irish forms) as in some other jurisdictions, the registration of the applicant as owner being more prominent. But the reference to "registered" land, and the possibility (in England) of removing the land "from the register," make it clear that the application is one for the placing of the land on the register for all purposes, as well as the entry of the applicant as owner.

In Manitoba[19] no form of application is prescribed, but the application is for registration of the owner's title "under the new system," and there are frequent references in the statute to the land being thus "brought under the provisions of the new system" and being "subject to the provisions of the Act."

In British Columbia, British Honduras, and Leeward Islands,[20] the form prescribed is framed somewhat as under the English statute—an application for registration of applicant's title rather than the land, but the statutes clearly shew that the land is to be placed on the register.

In the remaining twelve jurisdictions—New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, New Zealand, Saskatchewan, Alberta, North-West Terri-

[18] Eng. 1875 ss. 5 6, 11, 82; 1903-8 Rules, rr. 18-53, 71-77, ff. 1-4; Own. & Inc. 69-85 I. 1891, ss. 22, 26, 27; 1910 O. 2; ff. 3-5. On. 1914, ss. 6-8, 16; 1911 Rules, rr. 2-5, ff. 1-4.

[19] M. 1913, s. 28.

[20] B. C. 1911 ss. 14, 16, 44, 46, sch. 1 ff. A, N; B. H. 1914, s. 3, sch. B; L. Is. 1886 (1914) ss. 12, 128, 131, sch. f. 1.

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ories, Trinidad-Tobago, and Jamaica [21]—the application is one to have the land brought under the operation or provisions of the statutes, and a certificate of title issued to the applicant or his nominee. Here the two parts of the application are clearly distinguished.

With respect to the registration of the land itself, some provisions must be noticed that relate to the method of describing it, the furnishing of a plan, and the area and situation of the land. In four jurisdictions only is any particular method of description provided for. In England and Ireland [22] the basis of all description of land on the register is the ordnance map; no provision is made in Ireland for other official maps, but in England land is to be described by means of special maps kept at the registry or a separate map or plan for individual parcels, and a similar practice seems to obtain in Ireland. In Ontario [23] registered land is to be "described in such manner as the proper master of titles deems best calculated to secure accuracy," but a plan is not made essential. In Jamaica [24] the land may be described "by plat or diagram, by metes and bounds," or by "reputed name," though a description merely by "reputed name" has been said to cause "difficulty and inconvenience." [25]

As to the furnishing of a plan of the land comprised in the application, in Jamaica (as above stated) this may be done at the option of the applicant, and so in British Honduras.[26] In England and Ireland the use of a plan is compulsory to the extent stated above, and in New Zealand and Trinidad-Tobago [27] a plan must be filed with the application. In New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, and Lee-

[21] N. S. W. 1900, ss. 14, 16, 114, sch. 2; Q. 1861, ss. 16, 17, 120, sch. A; S. A. 1886, ss. 27. 29, 30, 220. sch. 2; Tas. 1862, ss. 15, 104. and 1863, s. 4, sch. A; V. 1915, ss. 18, 38, 109, 113, 201 *et seq.*, sch. 2; W. A. 1893, ss. 20, 39, 156 *et seq.*, sch. 2, and 1909, s. 4; N. Z. 1915. ss. 20, 21, 178, sch. 2 f. A; Sas. 1917, ss. 31, 32, sch. ff. B. C.; Al. 1906, ss. 27, 28, sch. ff. F, G; Can. 1906, ss 55, 56, sch. ff. F, G; Tr. 1902, ss. 10-13, sch. 1 f. A; J. 1888, ss. 19-21, 36, sch. 1. And see Aust. Torr. Syst. 738; Can. Torr. Syst. 68.

[22] Eng. 1897, s. 14; 1903-8 Rules, rr. 269-282; Own. & Inc. 71; Br. & Sh. 457. I. 1891, ss. 55-60; 1910 O. 9; Bro. & Gl. 17, 28, 169. 259. The question of the conclusiveness of the defined boundaries, included in these references, is not dealt with here.

[23] On. 1914, s. 98. And see s. 24, and 1911 Rules, r. 67, and preceding note.

[24] J. 1888. s. 21.

[25] *Smith* v. *Registrar of Titles*, and *Anderson* v. *Baker* (1910) Jamaica, unreported.

[26] B. H. 1914, s. 26, sch. B, the only references in the statute to a plan.

[27] N. Z. 1915, ss. 21, 178; Tr. 1902, s. 13.

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ward Islands,[28] the filing of a plan is at the option of the registry, and the applicant must file a plan if required to do so. In the remaining jurisdictions—Ontario, Manitoba, British Columbia, Saskatchewan, Alberta, and North-West Territories—no plan appears to be necessary upon an initial application, though plans may be registered upon dealing with the land subsequently.[29]

As to area and situation of land, the area that may be included in the same application is in British Columbia and Manitoba [30] limited to 2,000 acres. In other jurisdictions there appears to be no limit so far as the application itself is concerned, though considerations of convenience may restrict the number of separate parcels to be included in one certificate of title.[31] The rule has however been laid down in New South Wales (and it seems one to be observed generally) that separate parcels of land that are not contiguous cannot be included in the same application.[32] The Manitoba enactment already referred to expressly permits "any number of lots under the same plan of sub-division" to be included in one application; the British Columbia enactment impliedly gives the same permission, but forbids the inclusion of "unsubdivided lands which are not contiguous" in a single application. In Jamaica, whilst more than one parcel of land may be included in the same application, each parcel held under a distinct root of title is treated, so far as regards the fees payable, as the subject of a separate application.[33]

The provision in the statutes of Tasmania, Victoria, Western Australia, and Trinidad-Tobago,[34] as to posting on the land notice of the application when a title by possession is claimed, seems not to have found a place in other statutes.

With respect to the registration of the owner and his title, the applicant must usually state what his interest in the land is and

[28] N. S. W. 1900, s. 114; Q. 1861, s. 120; S. A. 1886, ss. 220 (8), 241; Tas. 1862, s. 104; V. 1915, s. 201; W. A. 1893, s. 156; L. Is. 1886 (1914) s. 145.

[29] On. 1914, s. 106; M. 1913, s. 62; B. C. 1911, s. 100; Sas. 1917, s. 79; Al. 1906, s. 53; Can. 1906, s. 83. All these enactments, except that of Manitoba, appear to be framed on the model of one or other of the Australian statutes (see preceding note), and to omit intentionally any reference to initial registration.

[30] B. C. 1911, s. 20B; M. 1913, s. 33.

[31] Aust. Torr. Syst. 739; V. 1915, ss. 48, 75; W. A. 1893, ss. 49, 71. The Manitoba enactment (s. 33) also limits the area to be included in a single certificate of title: so in British Columbia: B. C. 1911, s. 20C; and Saskatchewan: Sas. 1917, s. 52.

[32] *Ex p. Burnell* (1864) 3 S. C. (N. S. W.) 148.

[33] *In re Oppenheimer's Application* (1912) Jamaica, unreported.

[34] Tas. 1893, s. 3; V. 1915, s. 23; W. A. 1893, s. 24; Tr. 1902, s. 20.

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how his title to that interest is supported, what interests are vested in other persons, and who is in occupation of the land. Other matters to be stated are the names of adjoining owners and occupiers, and the value of the land. The title deeds in applicant's possession are usually required to be delivered at the registry with the application. In the Manitoba and British Honduras statutes nothing is said about title deeds.

In Manitoba, British Columbia, British Honduras, and Leeward Islands, no provision is made for stating who is in occupation of the land. In other jurisdictions the prescribed forms of application require particulars of the occupancy to be given, and in several instances—New South Wales, Queensland, South Australia, Tasmania, New Zealand — these forms contemplate that ordinarily the land will not be held by an occupier adversely to the applicant. Only in British Honduras, Trinidad-Tobago, and Jamaica, is it actually provided by the statutes themselves that an application shall not be made where the land is in the adverse occupation of another person.[35] In other jurisdictions—New South Wales, Queensland, South Australia, and Tasmania[36]—the statutes themselves refer to the possibility of the land being occupied adversely to the applicant. In these jurisdictions, and also in others—for instance, New Zealand—where the statutes are silent on this point, an application will be entertained, and may succeed, notwithstanding that an adverse occupation exists whether stated or not on the face of the application.[37] This seems also to be implied in those statutes which (as in England, Ireland, and others[38]) refer expressly to the effect of length of possession on the registered title. The practice prescribed in British Honduras, Trinidad-Tobago, and Jamaica, is thus opposed to the general rule; in Trinidad-Tobago an applicant, even after proving a good title, cannot

[35] B. H. 1914, s. 7; Tr. 1902, ss. 11, 26; J. 1888, s. 22. Each of these enactments differs completely from the others. The interpretation of the Jamaica section may possibly be open to doubt, but seems to be that adopted in the text. There is a reference to "adverse occupation" in s. 12 of the Tr. 1902 which appears to have crept in by mistake in adapting an Australian statute.

[36] N. S. W. 1900, s. 16 (1); Q. 1861, s. 17; S. A. 1886, s. 29; Tas. 1862, s. 15.

[37] *Ex p. Hamilton* (1864) 3 S. C. (N. S. W.) 311; *Smith* v. *Registrar-General* [1909] S. A. R. 1; *In re Howes* (1873) 1 N. Z. Jur. 112; *Kelly* v. *Bentinck* (1902) 22 N. Z. R. 235; *Fergie* v. *Byrne* (1866) 3 W. W. & a'B. L. 56; *Murphy* v. *Michel* (1866) 4 W. W. & a'B. L. 13 (the two last under the original statute of 1862 in Victoria).

[38] Eng. 1897, s. 12; I. 1891, s. 52. And see Own. & Inc. 73. The subject of adverse possession is dealt with in Chap. III., *post*.

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have his application granted until he has recovered the land by ordinary process of law,[39] and this would seem to hold in Jamaica. In other jurisdictions the ability of a person out of possession to make an application for initial registration in effect enables a judicial declaration of title to be made as between adverse claimants, though this was not the original intention of most systems of registration of title.[40]

Disclosure of others' interests in the land is required of the applicant, as already stated. This refers to actual and substantial interests, not mere claims and trespasses.[41] Non-disclosure of a title already ripe by long adverse possession might be regarded differently in such jurisdictions as South Australia on the one hand and New South Wales on the other, since in the former the registered owner would gain no title, while in the latter the registration would (unless fraud could be proved) wipe out the title by adverse possession.[42]

In England and Ontario [43] the statutes contain certain references to the number of persons who may be registered as owners of the same piece of land, but there is now no limit to the number.

The formal application must usually, as already stated, be verified by statutory declaration, &c. It may usually be signed by attorney or agent, but applications by attorneys under power are expressly provided for in New South Wales, Queensland, South Australia, Tasmania, New Zealand, and Jamaica.[44] New South Wales provides for the cases of corporations and absentee owners, Jamaica for corporations only, Tasmania and New Zealand for absentees only; in every case the attorney must have power to sell land.

In England, Ontario, British Columbia, and Leeward Islands,[45] the applicant may apply to be registered with "possessory title"

[39] *Robinson* v. *Loney* (1898) 1 Tr. & Tob. 69.

[40] At any rate as to the Australian system: *Sheridan* v. *Gilles* (1887) 21 S. A. R. 7; *Smith* v. *Registrar-General*, *supra*. So in cases of judicial declaration of title: *In re Carson's Estate* (1870) 4 I. R. Eq. 555; *Re Bell* (1871) 3 Ch. Ch. 239 (On.). As an instance of an enactment contrary to that in Trinidad-Tobago and Jamaica, see the Sudan Title of Lands Ordinance, 1899, s. 2: "Every person claiming to be entitled to land of which he is *not in possession*," &c.

[41] *In re Tanner* (1886) 5 N. Z. S. C. 102; *In re Beckett* (1894) 15 N. S. W. 94.

[42] S. A. 1886, s. 69 (6); N. S. W. 1900, s. 45. On the relation between registration and adverse possession, see Chap. III., *post*.

[43] Eng. 1875, s. 83, repealed by 1897, s. 14; On. 1914, s. 97, and 1911 Rules, r. 53.

[44] N. S. W. 1900, s. 14 (2) (*d*, *e*); Q. 1861, s. 93; S. A. 1886, s. 27; Tas. 1863, s. 4; N. Z. 1915, s. 20 (1) (f); J. 1888, s. 19.

[45] Eng. 1875, s. 5, and 1903-8 Rules, r. 52; On. 1914, s. 6; B. C. 1911, s. 14; L. Is. 1886 (1914), ss. 124-126.

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only, called in British Columbia registration of the "absolute fee." For the purposes of the application this only means that investigation of the title offered, and the full state warranty founded on that investigation, are not asked for. In British Columbia registration must be with fully warranted title if the land is comprised in an unregistered Crown grant, and registration with any other title may be prohibited in certain districts; under-surface rights are in each case excepted.[46]

In England, Ontario, and Leeward Islands,[47] the applicant may also apply to be registered with "qualified" title (including in England "good leasehold title"). Here investigation of the title offered is asked for, but full State warranty is to be subject to exception in respect of some specified matter or defect in the title. In England, Ireland, and Jamaica,[48] it is further provided that registration with qualified title may also be made upon an application for fully warranted or unqualified title, and in British Columbia [49] registration with possessory title (the "absolute fee") upon an application for fully warranted or "indefeasible" title. The enactment in Ireland differs in form from others, being merely an authority to the registrar to dispense with ascertaining equities and burdens affecting the land, but the principle of a statutory distinction between unqualified title with full State warranty and qualified title with modified State warranty is precisely the same as in other jurisdictions.[50]

In all jurisdictions the registration of an applicant's title may always at his option be made subject to some stated qualification or exception. Whether the registration be with "possessory" or "qualified" title of any kind, the difference between this and registration without qualification—that is, with a title, whatever called, which carries the full State warranty given by the particular statute concerned—is simply a matter of degree. The title is registered either without qualification or as subject to some qualification greater or less. In some cases the title offered is to be fully investigated, in others it is not. The procedure in either case is, with this exception, substantially the same.

In one jurisdiction—British Honduras—a fully warranted title cannot be had at once, the title registered being at first primâ

[46] B. C. 1911, ss. 15, 17, 173 (*d*).

[47] See note 45.

[48] Eng. 1875, s. 9, and 1903-8 Rules, rr. 53, 54; I. 1891, s. 29; J. 1888, ss. 16, 22.

[49] B. C. 1911, s. 14.

[50] I. 1891, s. 29; 1910 O. 5; *In re Keogh and Kettle* [1896] 1 I. R. 285; *In re Hazlette* [1915] 1 I. R. 285; *In re Owen Smith* [1917] 1 I. R. 170. See notes in Bro. & Gl. 132-134.

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facie only and not fully warranted until the lapse of an interval varying from two to ten years; British Honduras is also peculiar in providing for the registration of legal titles only, equitable interests being expressly excepted from actual registration.[51]

Amending the description of the land by making it more accurate has some resemblance to obtaining a fuller State warranty by converting a "possessory" or "qualified" title into an unqualified one. In England and Ireland [52] the position of the boundaries may be fixed accurately and made conclusive subsequently to the making of the initial application, and in Jamaica [53] a subsequent application may be made for registration by plan. In England, British Columbia, and Leeward Islands,[54] a qualified title may be converted into a fully warranted title on the register, and in Ireland the qualified title may be turned into a fully warranted one by the ascertainment of the actual burdens affecting the land.[55]

The question has been raised whether the making of a formal application for initial registration is so far in the nature of litigation as to stop any statute of limitation running in favour of an adverse occupant.[56] On the whole, the better opinion seems to be that no such effect is produced by an application merely, and that the application for registration is not in itself in the nature of litigation for this purpose. Where the statutes refer to any conflict between registration and possession, it is the actual time of registration that is made the turning point.[57] It is not until the application is opposed that litigation can be said to begin, the entering of a caveat being "really in the nature of the initiation of litigation."[58]

The whole procedure of initial registration may be divided into three stages. The first stage is to examine the application and ascertain how far sufficient ground has been shown primâ facie for registering the land with the applicant as its owner. The second

[51] B. H. 1914, ss. 9, 15, 16, 40, sch. D. The plan of postponing the full effect of registration is found also in the Ceylon Land Registration Ordinance 1907.

[52] Eng. 1897, s. 14, and 1903-8 Rules, rr. 272-274; I. 1891, ss. 55-60, and 1910 O. 9. [53] J. 1888, s. 21; 1910, s. 7.

[54] Eng. 1903-8 Rules, rr. 49, 52; B. C. 1911 s. 16; L. Is. 1886 (1914) ss. 130-135. [55] See note 50.

[56] Aust. Torr. Syst. 752; Niblack's Torrens System (1903) 46.

[57] For instance, Manitoba: M. 1913, s. 82, made more emphatic in this case by the distinction (s. 2) between land being "subject to" the new system pending an application, and "under" the new system by the issue of the certificate of title.

[58] *Concord Munic. Dist.* v. *Coles* (1905) 3 C. L. R. 96, 108. And see *Macmillan* v. *Att.-Gen.* (1912) 4 Ea. Af. R. 120.

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stage is to publish notice of the application and fix a date at which the primâ facie ground for registration will be considered conclusive in the absence of objections or adverse claims; if objections or adverse claims are made, these are fought out between the parties themselves. The third stage is to complete the registration—in the event of the right to registration not being challenged or (if challenged) being upheld—by placing the land on the register with the person entitled named as its owner. These stages are not always clearly separated in the statutes, or even in text-books, the enactment and statement of the numerous detailed steps to be taken rendering this difficult. These distinct stages do however exist, and their recognition helps towards an understanding of the meaning and objects of the procedure. The principal provisions on the subject, as laid down in statutes, rules, and annotated editions of these, appear sufficiently by the references to text-books, statutes, &c., in the note below.[59]

The application having been formally made, the first stage in the procedure is for the registry to check the description of the property and investigate the title offered by the applicant. In England and Ireland the procedure as to boundaries will vary according as a general or a fixed boundary is asked for; in all jurisdictions the difference between town and country land will involve differences in procedure. In England, Ireland, Ontario, British Columbia, Jamaica, and Leeward Islands, the procedure as to investigation of title will vary according as a fully warranted or a qualified title is required (*ante,* p. 51), the difference being essentially one of degree only. The standard procedure may be taken to be that concerned with applications for fully warranted title.

The examination of the application in the registry is conducted on the principles and according to the rules governing the examination of the vendor's title on behalf of a purchaser of the land.[60] The best analogy to this first stage is to be found in the proceedings for carrying into effect a contract for the sale and purchase of a piece of land, where the contract contains some reasonable conditions cutting down the purchaser's extreme rights as these would exist under an open contract. Whilst, however, some of the statutes make a "safe holding" title sufficient, others speak

[59] Own. & Inc. 69-85; Aust. Torr. Syst. 742-758; Can. Torr. Syst. 74-88; I. 1891 ss. 26, 29, 55, 60-62, 65-68, and 1910 O. 2, 3, 5, 7, 9; On. 1914, ss. 22-27, 81, 88, and 1911 Rules, rr. 1-22; B. C. 1911, ss. 14, 16, 22, 108-110, 114-120; B. H. 1914, ss. 4-29; Tr. 1902 ss. 14-29; J. 1888, ss. 22-35; L. Is. 1886 (1914) ss. 12-17, 124-126.

[60] *In re Eaton* (1879) 1 Q. L. J. Suppl. 9; *Smith* v. *Auckland Dist. Land Registrar* (1905) 24 N. Z. R. 862.

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indefinitely of a title being proved "to the satisfaction of" the registrar, or "appearing to" the registrar to be good, &c. It has indeed been laid down in the Australasian courts that only such a title can be accepted for registration as would be forced by the Court upon an unwilling purchaser,[61] and this is, in effect, to declare that only a "marketable" as distinguishable from a "safe holding" title can be registered. But this is contrary to the ordinary practice, and even to those enactments in the statutes themselves which permit an equitable title to be accepted as sufficient evidence of an estate in fee simple. It must be remembered that what may be a "marketable" title in one jurisdiction may not be such in another. The standard of strictness in proof required is considerably lowered by the operation of statutes like the English Vendor and Purchaser Act 1874, and the general use of certain well-known local conditions of sale may have a similar effect.[62]

The jurisdictions in which no standard of title is enacted, beyond permitting an equitable title to be accepted, are: New South Wales, Queensland, South Australia, New Zealand, Saskatchewan, Alberta, North-West Territories, Trinidad-Tobago, Leeward Islands.

In Tasmania, Victoria, Western Australia, and Jamaica,[63] an admittedly defective title may be accepted for registration upon payment of an increased fee to the assurance fund, and in Manitoba[64] an increased fee may be payable for accepting a Crown grant ten years old without investigation.

In England, Ireland, Ontario, British Columbia, Manitoba, and British Honduras,[65] the statutes expressly permit either a safe holding title to be accepted, or evidence short of strict legal proof. In Jamaica also it is sufficient if the applicant can "maintain and defend his possession."[66] In the British Columbia enactment the expression used is "good safe holding and marketable title," in which it is difficult to give any precise meaning to the word "marketable"; however, the absence of the usual vendor's covenants for title from a conveyance does not render a title unmarket-

[61] Cases in preceding note.

[62] For instance, in British Columbia with respect to tax sales, see B. C. 1911, s. 36; *Temple* v. *North Vancouver Corp.* (1913) 25 West. R. 245, 350; *Ex p. Lamson* (1915) 21 B. C. R 507. In New South Wales, as to common conditions, see *In re Wallis* (1903) 3 S. R. (N. S. W.) 615, 620.

[63] Tas. 1886, s. 20; V. 1915, ss. 44, 119; W. A. 1893, s. 45; J. 1888, s. 36. Illustrations are: *In re Salter* (1871) 2 V. R. L. 113; *In re Swallow and Ariell* (1894) 20 V L. R. 308.

[64] M. 1913, s 48.

[65] Eng. 1875, s. 17 and 1903-8 Rules, rr. 24-28; I. 1910 O. 5; On. 1914, s. 22; B. C. 1914, s. 14; M. 1913, ss 40, 49, 58; B. H. 1914, s. 10. And see Own & Inc. 73; *In re G——* (1893) 21 O R. 109, relaxation of strict rules of evidence.

[66] J 1888, s. 22. *Cf.* Leeward Islands—L. Is. 1886 (1914), s. 14 *ante*, p. 35. The Jamaica limitation Act differs from the English statute: p. 96 *post*.

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able or unfit for registration.[67] But the irregular exercise of a power of sale by mortgagee would justify the rejection of a title.[68]

Express provision is made in most jurisdictions for the determination of disputed points of law or fact that arise in the course of the investigation of the applicant's title. This is done by referring the question to the ordinary courts, where the registry is distinct from the court;[69] references will however often resemble ordinary appeals, particularly in those jurisdictions in which the registry is, or tends to be, a branch of the court.[70] In Alberta, North-West Territories, British Honduras, Trinidad-Tobago, and Leeward Islands, the application is actually referred to a judge of the Supreme Court for consideration.

The determination of the question whether the applicant has shewn a primâ facie right to have the land registered, with himself as owner, brings the procedure to the end of the first stage. But even if the registry is satisfied with the primâ facie title shewn, and this is intimated to the applicant, any proper objection may still be taken before the registration is actually effected, and the applicant is not necessarily entitled to be registered merely because no caveat is entered.[71]

The second stage is the period during which notice of the application is published and claims adverse to the applicant are invited, and if made, fought out. Here there is some resemblance to Limitation and Quieting Title Acts, inasmuch as a time limit—varying from weeks to years—is set for the enforcement of adverse claims, with a view to their being barred when the contemplated judicial declaration of title (as it may be called) has once been carried into effect by final entry of the land and ownership on the register.

[67] *Re Dalgleish* (1910) 14 West. R. 255 (B.C.), citing *Scott* v. *Alvarez* [1895] 2 Ch. 603.

[68] *Re Shore* (1890) 6 Man. R. 305: *In re Salter* (1871) 2 V. R. L. 113.

[69] An illustration is *In re Anderson* [1911] V. L. R. 297, where the registry took exception to the applicant's title, and the title was held bad by the Court. Here the registry had obtained information aliunde, but this is the kind of case that is usually fought out at a later stage between rival claimants.

[70] England, see Own. & Inc. 74. Australasia, see Aust. Torr. Syst. 742, 743; V. 1915, ss. 238, 248, 249; N. Z. 1915, ss. 199-205. I. 1891, ss. 13, 14; 1910, O. 6. On. 1914, ss 88, 140 B. C. 1911, ss. 108-116 D. 172. M. 1913 ss. 130-134. Sas. 1917, ss. 157, 158, 188. Al. 1906, ss. 112, 113, 147. Can. 1906, ss. 152, 153. B. H. 1914, ss. 7-10. Tr. 1902, ss. 14-17. L. Is. 1886 (1914) ss. 13, 15, 16.

[71] *Manning* v. *Commr. of Titles* (1890) 15 A. C. 195. The rule laid down is embodied in the statutes of Alberta and North-West Territories (and formerly Saskatchewan) by inserting the words "if he entertains no doubt," &c.: Al. 1906, s. 29 (1); Can. 1906, s. 57.

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The application is made public by inserting notice in official gazettes and ordinary newspapers, by serving notice on adjoining owners and occupiers and other persons who may be supposed to be specially interested, and by posting notice in public offices; when (in Tasmania, Victoria, Western Australia, and Trinidad-Tobago) the applicant claims title by possession, notice is also posted on the land itself (*ante*, p. 48). The amount of publicity and the length of the time limit are governed by the nature of the applicant's title. In England and Ireland special notice to adjoining owners and occupiers is necessary when the boundaries are to be fixed, and in Ontario special notice must be given if land is to be registered free from a public highway.[72] The requirements of the statutes as to publication of notice vary considerably. In England, Ireland, and Ontario [73] this publication is prescribed by the Rules. In the Australasian jurisdictions [74] it is part of the procedure prescribed in the statutes, and so in British Honduras, Trinidad-Tobago, and Jamaica.[75] In the British Columbia statutes publication of notice seems not to be expressly required at all, and in Manitoba, Saskatchewan, Alberta, North-West Territories, and Leeward Islands,[76] only when some adverse interest seems likely to be in existence.

In all nineteen jurisdictions, except British Columbia, provision is made for objections and adverse claims to be brought in and heard before the applicant's registration is completed. In British Columbia [77] an adverse claimant can (besides entering a caveat) register a lis pendens as a charge against the land, and the registration (if effected) will be subject to all rights of the person registering the lis pendens; these rights may subsequently be litigated by formally contesting the registered owner's right to be registered. In seven jurisdictions—England, Ireland, Ontario, Saskatchewan,

[72] Eng. 1903-8 Rules, r. 272; I. 1891, s. 57, and 1910 O. 9, r. 3; On. 1914, s. 24 (3).

[73] Eng. 1903-8 Rules, rr. 28-30; I. 1910 O. 2, r. 5; On. 1911 Rules, rr. 11-13.

[74] Aust. Torr. Syst. 744; V. 1915, ss. 19-23, 110, 111; N. Z. 1915, ss. 23-28.

[75] B. H. 1914, ss. 5-7; Tr. 1902, ss. 16, 17, 19; J. 1888, ss. 24, 27.

[76] M. 1913, s. 43; Sas. 1917, s. 42; Al. 1906, s. 34; Can. 1906, s. 65; L. Is. 1886 (1914) s. 16.

[77] B. C. 1911, ss. 71, 72, 117. The sections relating to caveats are: ss. 14, 22, 62, 67A. But in British Columbia all transactions are treated more or less like initial applications, and the provisions as to caveats do not distinguish (as is done in other jurisdictions) between initial applications and subsequent transactions. A subsequent transaction involves an "application" to the registry in British Columbia as regularly as initial registration does.

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Alberta, North-West Territories, and British Honduras [78]—provision is made for any one interested lodging a short statement of his objections, and the matter is decided between the parties by the registering authority—registrar, judge, &c.—subject to rights of appeal to the Courts in a more formal way.

In England, Ireland, and Ontario,[79] provision is also made for any person claiming "such an interest . . . as entitles him to object to any disposition" of the land to enter a "caution," which will entitle him to notice "of any application that may be made" for registration. In Ontario the caution must be renewed before the end of five years, or it ceases to have any effect; and a second caution can only be entered by special permission (s. 76), though this may apply only to cautions against transactions. These provisions contemplate the entry of a caution *quia timet*, and not by way of objecting to an application already made. This kind of "caution" is quite different from the "caveat" next to be referred to.[80] The nature of the interest that will entitle an objection or adverse claim to be made, or a caution entered, is however left indefinite. In the case of the "caveat" this is not so, and the question of what is a sufficient interest to support a caveat has frequently arisen in the courts. It may be that cases on caveats furnish some guide to the kind of interest required under objections, adverse claims, and cautions, in other jurisdictions.

In the other eleven jurisdictions then—seven Australasian, Manitoba, Trinidad-Tobago, Jamaica, and Leeward Islands [81]—a

[78] Eng. 1903-8 Rules, rr. 31-33; I. 1891, s. 62, and 1910 O. 14, r. 3; On. 1911 Rules, rr. 14-16; Sas. 1917, ss. 40, 41; Al. 1906, ss. 32, 33; Can. 1906, ss. 63, 64; B. H. 1914 s. 9.

[79] Eng. 1875, ss. 60-64, and 1903-8 Rules, rr. 88-94; I. 1891, s. 61, and 1910, O. 7. r. 1; On. 1914, ss. 76, 81, 83-86, and 1911 Rules, rr. 22, 24. See Own. & Inc. 75.

[80] Perhaps an exception occurs in the case of the Leeward Islands where the "caveat" is rather of a *quia timet* character: L. Is. 1886 (1914) s. 17, and next note.

[81] N. S. W. 1900. ss. 24-28, 97, 98, sch. 3; Q. 1861. ss. 23-26, 99, 100, 102, 103, sch. B, and 1877. ss. 36-38; S. A. 1886, ss. 30, 40, 44, 45, 191, schs. 3, 21; Tas. 1862 ss. 22-24, 83, 85, sch. B, and 1886, s. 21; V. 1915, ss. 29-31, 114, 186, 221, sch. 4; W. A. 1893, ss. 30-32, 140 176, sch. 6; N. Z. 1915, ss. 145, 147-149, 151-157, sch. 2 f. K; M. 1913, ss. 135 137, 141-153, schs. G, K, L; Tr 1902 ss. 24-26, 119, sch. 1 f. C.; J. 1888, ss. 32-34, 117, sch. 3; L. Is. 1886 (1914) ss. 17, 111-122 sch. B. f 24, and see Aust. Torr. Syst. 744 *et seq.*, 358; cases noted in annotated edition of Australasian statutes, particularly Hutch. 132-141. Caveats prior to initial registration may also be entered in Saskatchewan, Alberta, and North-West Territories, but no special procedure is prescribed and these caveats are treated as caveats against transactions. The relative sections (including withdrawal and compensation) are: Sas. 1917, ss. 133 (2), 137, 139; Al. 1906, ss. 86, 88, 94; Can. 1906, ss. 133, 137, 139. And see Can. Torr. Syst. 358.

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special procedure is provided for, and as the first step the objector files a "caveat" in which he "forbids" the registry to proceed with the application. The filing of this caveat is "in the nature of the initiation of litigation," and operates as a statutory injunction,[82] staying registration so that the question of disputed title may be settled by the applicant (including any nominee[83]) on the caveator taking proceedings for that purpose. The entry of a caveat and the adoption of the special procedure provided by the statutes is not of course compulsory, and ordinary proceedings by way of action for recovering the land, or obtaining an injunction and declaration of title, could be taken without filing any caveat.[84] If a caveat is filed the caveator must adhere strictly to the provisions of the statute, and may lose all right to an injunction if the caveat be once allowed to become inoperative through lapse of time.[85] The special procedure is more elaborate in New South Wales, South Australia, and Manitoba[86] than in other jurisdictions.

A caveat must be supported by a sufficient interest in the property, and must state the nature of the interest correctly.[87] Reference to the land as "described in the advertisement," "described in the application," "sought to be brought under" the new system, all have the same meaning, and refer to the interest which it is sought to place upon the register.[88] A statement that the caveator is "owner in fee simple by right of possession" will be sufficient where a title by possession is claimed, and part only of the land applied for may be claimed.[89] The interest of the caveator must be of a proprietary nature, and on this ground a local authority has

[82] *Concord Munic. Dist.* v. *Coles* (1905) 3 C. L. R. 96, 108; *Collins* v. *Featherstone* (1889) 10 N. S. W. Eq. 192; *Clissold* v. *Bellomi*, *ib.* 187, 191; *Gaffney* v. *McLaughlin* (1901) 1 S. R. (N. S. W.) 373, 379.

[83] The nominee (if any) must be a party to any proceedings between the applicant and the caveator: *Hay* v. *Nixon* (1891) 7 Man. R. 579.

[84] *Archibald* v. *Archibold* (1879) 5 V. L. R. 150; *Chappell* v. *Broughton* (1889) 11 N. S. W. Eq. 65; *Bethune* v. *Porteous* (1893) 19 V. L. R. 161; *Staples & Co.* v. *Corby* (1900) 19 N. Z. R. 517; *McGrath* v. *Williams* (1912) 12 S. R. (N. S. W.) 477.

[85] *Clissold* v. *Bellomi* (1889) 10 N. S. W. Eq. 187; *Bell* v. *Beckman*, *ib.* 251; *In re McNaughton* [1909] V. L. R. 398; *In re Sanday* (1910) 10 S. R. (N. S. W.) 826.

[86] N. S. W. 1900, s. 27; S. A. 1886, sch. 21; M. 1913, sch. L. The Manitoba rules seem to have been adopted from the South Australian. The case of *Bucknam* v. *Stewart* (1897, 11 Man. R. 491) illustrates the Manitoba procedure, the caveator (though in possession) being made plaintiff.

[87] The cases and observations here are merely supplementary to those in Aust. Torr. Syst. 746-749.

[88] See *Exp. Metropolitan Build. Soc.* (1884) 10 V. L. R. L. 361, cited in Aust. Torr. Syst. 747. The observations in the text and Aust. Torr. Syst. as to land described in advertisement or application cover the statutes in Manitoba, Trinidad-Tobago, and Jamaica: M. 1913, s. 135; Tr. 1902, s. 24; J. 1888, s. 32. South Australia has "sought to be brought under": S. A. 1886, s. 39. [89] *In re Robertson* (1907) 7 S. R. (N. S. W.) 474.

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not sufficient interest in the soil of a public road to entitle it to enter a caveat against initial registration.[90] The interest of a mortgagee, however informally secured to him,[91] will support a caveat, but even the possession of the title deeds will not entitle a statute-barred mortgagee to oppose an initial application by the owner of the land.[92] Anything that can be described as merely a personal interest, such as that of a covenantee entitled to have the land used only for certain restricted purposes, has also been held not to be sufficient interest in the land to support a caveat.[93]

The principle that a caveator must shew an actual interest in the land, and not merely a right under a personal covenant, would seem to apply to objections, adverse claims, and cautions, in other jurisdictions above referred to. There is, of course, still room for litigation as to what constitutes an "interest in land." There also seems to be no reason why the procedure of initial application should not be made use of in all jurisdictions where actual possession is not required of the applicant, in order to litigate title to land between applicant and objector, as is commonly done in the Australasian jurisdictions.[94]

A caveator who once allows the caveat to lapse, or the proceedings founded on the caveat to go against him by default, cannot as a rule receive any further protection.[95] In South Australia, New Zealand, and Manitoba, renewal or a second caveat is expressly permitted by consent or with leave; in Victoria, Western Australia, Jamaica, and Leeward Islands, such renewal, &c., is expressly forbidden.[96] In all these eleven jurisdictions, except Leeward Islands,

[90] *Concord Munic. Dist.* v. *Coles* (1905) 3 C. L. R. 96.

[91] See *Bucknam* v. *Stewart* (1897) 11 Man. R. 491, where applicant was a mortgagee.

[92] *Barnet* v. *Williams* (1889) 15 V. L. R. 205. *Beckett* v. *District Land Registrar* (1909) 28 N. Z. R. 788; but this case is also governed by a New Zealand enactment which makes a depositee of the deeds a pledgee merely, without any interest in the land: Property Law Act 1908 (No. 152), s. 63.

[93] *Staples & Co.* v. *Corby* (1900) 19 N. Z. R. 517, referred to in Aust. Torr. Syst. 748, and the following cases: *Woodberry* v. *Gilbert* (1907) 3 Tas. R. 7 (covenant not to let stables for livery business); *Ex p. Graves* (1905) 3 N. Z. Gaz. R. 318 (right to be relieved from forfeiture of a lease), referred to in Hutch. 134.

[94] See *Ex p. Hamilton* (1864) 3 S. C. (N. S. W.) 311; Aust. Torr. Syst. 722, 752; *Fergie* v. *Byrne* (1866) 3 W. W. & aB. L. 56.

[95] Aust. Torr. Syst. 750; but the Court is not absolutely without discretion: *In re McNaughton* [1909] V. L. R. 398. And see next notes.

[96] S. A. 1886, ss. 45, 191 (11); N. Z. 1915, s. 157; M. 1913, ss. 145, 148; V. 1915, s. 31; W. A. 1893, s. 32; J. 1888, s. 34; L. Is. 1886 (1914) s. 122. Other enactments allowing renewal on terms seem to apply to caveats against transactions only; these are: V. 1915, s. 184; W. A. 1893, s. 138; J. 1888, s. 114.

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deliberate omission to enter a caveat or take proceedings may also operate as a bar to any future proceedings being taken for recovery of the land or for compensation.[97] This does not of course preclude an applicant and a would be caveator from coming to an agreement, and an agreement not to enter a caveat can be enforced even though not in writing.[98]

That a caveat may be withdrawn is expressly enacted in three jurisdictions only—New Zealand, Manitoba, and Leeward Islands,[99] though this is of course implied in the others. In all eleven the caveator is liable to the applicant for any loss or damage if the caveat be entered without reasonable cause;[1] in South Australia and Manitoba[2] the registrar is expressly excepted from any such liability, though the exception seems to be implied in the other statutes that impose the liability, the words in every instance being "any person lodging a caveat," which would hardly include the registrar.

The applicant cannot affect the rights of the caveator by conveying away the land to another person, the latter being then treated as the applicant's nominee.[3] He may however withdraw the application altogether, and if no proceedings beyond an injunction keeping the caveat in existence have been taken by either party, the caveat and injunction will both become inoperative, and will be no bar to a second application being made subsequently.[4] It would seem that if proceedings under the ordinary jurisdiction of the Court were taken by either applicant or caveator to test their opposing claims, it would then be too late for the applicant to prevent the questions at issue being decided by withdrawing the application.

Where the special procedure under the statutes of New South

[97] N. S. W. 1900, s. 130 (3); Q. 1861, s. 21; S. A. 1886, s. 216; Tas. 1862, s. 130; V. 1915, s. 256; W. A. 1893, s 211; N. Z. 1915, s. 196; M. 1913, s. 161; Tr. 1902, s. 139; J. 1888, s. 141.

[98] *Coker* v. *Spence* (1876) 2 V. L. R. L. 273, citing *Buttemere* v. *Hayes* (1839) 5 M. & W. at 459. A somewhat similar case of a verbal agreement being sufficient is *Smith* v. *Ernst* (1912) 22 Man. R. 363, where the agreement was that the title to certain land should be "Torrens."

[99] N. Z. 1915, s. 156; M. 1913, s. 142; L. Is. 1886 (1914), s. 116.

[1] N. S. W. 1900, s. 98; Q. 1861, s. 103; S. A. 1886, ss. 44, 191 (10); Tas. 1862, s. 85; V. 1915, s. 186; W A 1893, s. 140; N. Z. 1915, s. 155; M. 1913, ss. 142, 143; Tr. 1902, s. 119; J. 1888, s. 117; L. Is. 1886 (1914) s. 120. And see Aust. Torr. Syst. 749.

[2] S. A. 1886, s. 191 (10); M. 1913, s. 143. *Smith* v. *Registrar-General* [1909] S. A. R. 1.

[3] *Ex p. Murray* [1913] V. L. R. 546; *Macmillan* v. *Att.-Gen.* (1912) 4 Ea. Af. R. 120.

[4] *Gaffney* v. *McLaughlin* (1901) 1 S. R. (N. S. W.) 373.

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Wales, South Australia, or Manitoba (*ante*, p. 58) is availed of, it has been decided in Manitoba that the application is the foundation of the proceedings, and on its withdrawal at any stage the Court has no further jurisdiction to declare the substantive rights of the parties; there is however a New South Wales case opposed to this view, and it would seem more reasonable that even under the statutory procedure the applicant should not be allowed, by withdrawing his application, to prevent a final declaration of the parties' rights.[5]

In New South Wales, South Australia, and Tasmania, no condition or restriction is placed on the right of withdrawing the application, though in Queensland the consent is required of other persons who would be entitled to be registered on the application being granted.[6] In New Zealand[7] the application can only be withdrawn, when a caveat is in existence, with the consent of the caveator or by leave of the Court. In Victoria, Western Australia, Manitoba, Trinidad-Tobago, and Jamaica,[8] the applicant may be ordered, on withdrawing the application, to pay any expense to which the caveator has been put. The Leeward Islands statutes are silent on the subject of withdrawing the application. Probably the caveator, or any other person injured by the making of the application, could recover by action any actual loss suffered, in those jurisdictions where no special remedy is provided.[9]

On a mere summons or motion to remove the caveat the substantive rights of the parties cannot usually be determined. But if regular proceedings be taken, either in the ordinary way of litigation, or (in New South Wales, South Australia, and Manitoba) under the special procedure, a declaration of title may be made in favour of either caveator or applicant.[10] If the caveator actually claims and is held entitled to the ownership of the land, his rights will be declared accordingly. In the event of his then desiring to be registered—taking in fact the place of the applicant—he might possibly be required by the registry to make a formal application, but a fresh investigation of his title in detail would not usually be necessary.

[5] *Campbell* v. *Alloway* (1892) 8 Man. R. 225; *Saddington* v. *Hackett* (1880) 1 N. S. W. 155.

[6] N. S. W. 1900, s. 23; Q. 1861, s. 29, and 1877, s. 9; S. A. 1886, s. 41; Tas. 1862, s. 25.

[7] N. Z. 1915, ss. 29. 149.

[8] V. 1915. s. 33; W. A. 1893, s. 34; M. 1913, s. 39; Tr. 1902, s. 27; J. 1888. s. 30.

[9] See *Stockdale* v. *Hamilton* (1866) 5 S. C. (N. S. W.) 180; *Lachaume* v. *Broughton* (1903) 3 S. R. (N. S W.) 475.

[10] *Saddington* v. *Hackett* (1880) 1 N. S. W. 155; *Fisher* v. *Gaffney* (1884) 5 N. S. W. 276.

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In the other jurisdictions where the "caveat" procedure on initial application is not part of the system, no special provision is made for withdrawing ordinary objections and opposition to the application, or for making the objector or opponent liable to pay compensation other than costs. Withdrawal of a caution in England and Ontario is however dealt with in rules, and in England, Ireland, and Ontario the statutes provide for damages being recoverable for improper entry of a caution.[11]

Withdrawal of the application seems only to be referred to in the British Columbia statutes;[12] the applicant is liable to make compensation to a caveator if the latter has been put to expense.

When proceedings sufficient to decide the question of right between the parties have been instituted by either applicant or caveator, the question is fought out and the decision of the court given——apart from the difficulty under the statutory procedure in New South Wales, South Australia, and Manitoba—independently of the circumstances of the origin of the litigation. The question of title indeed can be decided with a view to a subsequent application being made,[13] and this is of course necessarily the point of view of a caveator when he institutes proceedings against the applicant as defendant.[14] The decision of the Court thus has the same relation to the registration of the title in all jurisdictions, whether the "caveat" procedure is in force or not. This decision is primâ facie binding only as between the parties, and its value as evidence of title arises from the fact that the land is intended—and the Court can so direct if necessary—to be placed on the register, the declared owner thus getting the benefit of the State warranty given by the registration statutes.[15]

[11] Eng. 1875 s. 63, and 1903-8 Rules, r. 92; I. 1891, s. 61; On. 1914, s. 85. and 1911 Rules, r. 24. The question of caveats on initial registration in Saskatchewan, Alberta, and North-West Territories is referred to in note 81 (*ante*, p. 57).

[12] B. C. 1911, s. 45; but no special provision is made for a caveat being filed on initial applications. See note 77 (*ante*, p. 56), as to "application" including transactions subsequent to initial registration.

[13] *Bradshaw* v. *Patterson* (1911) 18 West. R. 402 (Sas.).

[14] Illustrations are: *Goodbody* v. *Miller* (1893) 19 V. L. R. 581; *Trinidad Asphalt Lake* v. *Warner* (1894) 1 Tr. & Tob. 12. In each of these cases the caveator was plaintiff, and succeeded in establishing his title to the ownership of the land in place of the applicant.

[15] The principle adopted is that it is the actual registration, and not the judgment of the Court, that gives title. The principle upon which title is conferred under Quieting Title Acts and Declaration of Title Acts—such as the English Act of 1862 (25 & 26 Vict. c. 67)—is not adopted in any of the registration statutes dealt with in this book (*ante*, p. 1). The difference between the two principles is illustrated strongly in Manitoba and British Columbia; there a title may not be registered, even in pursuance of an order of the Court, unless it be found to be "safe holding": M. 1913, s. 58; B. C. 1911, s. 116A.

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This registration of the land and its owner constitutes the hird and final stage in the procedure of initial registration. It is ffected by entering the land on the register by its appropriate de-cription, with the name of the person entitled as its owner. The ctual moment at which registration is complete seems to be when he proper number in the register book is placed upon the folium r document constituting the owner's evidence of title to the land n the register; this is expressly enacted in the Australasian stat-tes, and in Saskatchewan, Alberta, North-West Territories, Trini-ad-Tobago, and Jamaica.[16] Manitoba and Leeward Islands[17] re not so precise, whilst the statutes in England, Ireland, On-ario, British Columbia, and British Honduras, appear to be silent n the subject.

In some jurisdictions and for some purposes the registration as relation back to the date of the application, or some other date. n England applications are to be entered and numbered in the rder in which they are delivered at the registry,[18] though this is robably the practice in most jurisdictions. In British Columbia he land is subject to all charges registered subsequently to the date f the application.[19] In Manitoba the mere filing of the applica-ion makes the land "subject to the new system" and unaffected by egistration at the deeds registry.[20] In the Australasian jurisdic-ions, Trinidad-Tobago, and Jamaica, on the death of the applicant r his nominee the registration is directed to be made as though it ere prior to the death.[21]

Some subsidiary matters connected with the completion of the egistration are the following: (1) Entering on the register in-umbrances and other interests affecting the land; (2) Entry of ny existing disability affecting the owner; (3) Issue of duplicate ocument of title; (4) Marking and custody of the owner's former nuniments of title, and noting new registration in the deeds reg-stry.

1. In all nineteen jurisdictions, except British Honduras, some eference is made by the statutes to the possible existence and the

[16] N. S. W. 1900, s. 35; Q. 1861, s. 34; S. A. 1886 s. 50; Tas. 1862, . 34; V. 1915, s. 51; W. A. 1893, s. 52; N. Z. 1915, s. 34 (1); Sas. 1917, . 49; Al. 1906, s. 22; Can. 1906. s. 45 (1); Tr. 1902, s. 40; J. 1888, s. 43.

[17] M. 1913, s. 72; L. Is. 1886 (1914) s. 5.

[18] Eng. 1903-8 Rules, r. 23; the former rule (1903, r. 22) is abro-ated.

[19] B. C. 1911, s. 22 (1) (*g*). [20] M. 1913, s. 37.

[21] N. S. W. 1900, ss. 30, 31; Q. 1861, s. 31; S. A. 1886, s. 43; Tas. 862, s. 27; V. 1915, s. 37; W. A. 1893, s. 38; N. Z. 1915, s. 67; Tr. 902, s. 29; J. 1888, s. 35. And see Aust. Torr. Syst. 1014; Queensland—rants to Deceased Persons Act 1884 (48 Vict. No. 9).

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effect of incumbrances on and other interests in the land at the time of initial registration being completed. In England, Ontario, Manitoba, Victoria, and Western Australia, the statutes contain no actual direction that all incumbrances outstanding shall be entered on the register; such a direction however certainly seems to be implied. In Ireland, Queensland, New Zealand, British Columbia, and Leeward Islands,[22] estates and interests other than ordinary incumbrances are directed to be noted on the register in the same way as incumbrances, and in British Columbia the registered title is subject to charges registered since date of application for registration. In New South Wales, Tasmania, Trinidad-Tobago, Saskatchewan, Alberta, and North-West Territories,[23] leases as well as mortgages and charges are to be noted as existing incumbrances. In South Australia rent-charges are included among the incumbrances to be so noted, and in Jamaica "incumbrances" generally are to appear.[24] All these incumbrances and interests are in fact treated as qualifications of the full ownership of the land, and in some statutes the word "qualification" is actually used; instances are Saskatchewan, Alberta, and North-West Territories.[25] These "qualifying" incumbrances are in some jurisdictions treated as being registered under the new system; in others as interests to be dealt with under the general law and as though the land were not registered; in others again their position is left ambiguous, or some incumbrances are treated in one way and some in another.

In Tasmania, Victoria, Western Australia, New Zealand, Trinidad-Tobago, and Jamaica,[26] outstanding mortgages are treated for nearly all purposes as created under the new system, though the rights of the mortgagee remain substantially unaffected. In Manitoba,[27] on the other hand, outstanding mortgages are treated as though the land remain unregistered. In England, Ireland, and

[22] I. 1891, s. 29; Q. 1861, s. 33; N. Z. 1915, s. 62; B. C. 1911, s. 53; L. Is. 1886 (1914) ss. 4, 9, 13, 56. In British Columbia and Leeward Islands the sections cited actually direct all other interests to be treated aa incumbrances.

[23] N. S. W. 1900, s. 33; Tas. 1862 s. 32; Tr. 1902, s. 34; Sas. 1917, s. 35; Al. 1906, s. 29; Can. 1906, s. 59.

[24] S. A. 1886, s. 77; J. 1888, s. 23.

[25] Sas. 1917, ss. 35 46; Al. 1906, ss. 26, 29; Can. 1906, 49, 50. 58, 59.

[26] Tas. 1893, s. 4; V. 1915, ss. 167-174; W. A. 1893, ss. 124, 128; N. Z. 1915, s. 54; Tr 1902, ss. 81, 84; J. 1888, ss. 23, 109. *In Re Smith* (1893) 15 Aust. L. T 85. in part abrogated by V. 1915, ss. 168-174. And as to incumbered Crown leases in Western Australia, see W. A. 1911, s. 2,

[27] M. 1913. s. 34.

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Ontario,[28] outstanding incumbrances are for some purposes, but not all, treated as being under the new system, the rights of the incumbrancers being substantially unaffected. In New South Wales, Queensland, South Australia, and Leeward Islands,[29] nothing is expressly said by the statutes as to the status of the "outstanding" mortgage. There seems however to be no doubt that in all cases where nothing is enacted to the contrary the outstanding incumbrance is to be regarded as qualifying the title of the registered owner, so that the rights and remedies of the owner of the incumbrance, in respect of the registered land and the interest of the registered owner therein, are not affected.[30]

The general rule is that all actual incumbrances (whether by way of charge or ownership) on the land, and particularly those appearing as registered under the general law in a deeds registry, should be noted in the order of their priority on the owner's register or certificate of title when initial registration is completed.[31] Occasionally however, the deeds registry may disclose an interest which will not be allowed to be entered on the new register, as not being an actual "interest in the land" but a restrictive personal covenant only.[32] The entry of these outstanding incumbrances is not usually any warranty of their validity, nor is their priority inter se—under any deeds registry or otherwise—affected. This is specially provided for in England and Ontario, but would seem to be the general rule,[33] though an exception is made in the Leeward Islands.[34]

In one respect New South Wales and Trinidad-Tobago are peculiar. Where leasehold land has been registered and a certificate of title duly issued to the owner, this registration is in effect

[28] Eng. 1875, s. 19, and 1903-8 Rules, rr. 175, 216, 217; I. 1891, ss. 29, 39; On. 1914, ss. 26, 27; Own. & Inc. 205. *In re Winter* (1873) L. R. 15 Eq. 156 (under the English Act of 1862). *In re Purvis* [1907] 1 I. R. 447; *In re Hazlette* [1915] 1 I. R. 285.

[29] N. S. W. 1900, s. 33; Q. 1861, s. 33; S. A. 1886, s. 77; L. Is. 1886 (1914) ss. 4, 12, 13.

[30] *In re Smith, supra; In re Winter, supra; In re Purvis, supra; Rex* v. *White* (1904) 4 S. R. (N. S. W.) 379.

[31] *In re Canadian Pacific Ry.* (1899) 4 Terr. R. 227; *Kenna* v. *Ritchie* [1907] V. L. R. 386; *Davidson* v. *O'Halloran* [1913] V. L. R. 367; *Rex* v. *White* (1904) 4 S. R. (N. S. W.) 379.

[32] *Staples & Co.* v. *Corby* (1900) 19 N. Z. R. 517. *Sed. qu.* whether this case was rightly decided: see Aust. Torr. Syst. 748, 1038, and cases there cited.

[33] Eng. 1903-8 Rules, r. 175; On. 1914, s. 26. *Davidson* v. *O'Halloran, supra.*

[34] L. Is. 1886 (1914) s. 8, which appears to apply to incumbrances existing at the time of initial registration.

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cancelled upon the owner of the fee becoming registered; the leasehold interest is then noted as a quasi-incumbrance upon the register of the freehold.[35] In most cases however concurrent or successive interests or estates can be separately registered as substantive ownerships. This is referred to further on in connexion with the issue of certificates of title: and see Sect. 1, *ante,* p. 31).

2. In ten jurisdictions out of the nineteen, the statutes direct the fact of the owner being under any disability to be stated on the register, the direction being for the most part contained in the enactments which direct outstanding interests to be noted. The ten jurisdictions are: Ireland (where infancy only is mentioned), New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, New Zealand, Trinidad-Tobago, and Jamaica.[36] The absence of these provisions from the statutes of the other jurisdictions raises a question, as to the extent of the warranty of title, which will be noticed hereafter.

3. In every one of the nineteen jurisdictions the registered owner is, upon initial registration, entitled to have in his possession what is really a duplicate of the register. In British Honduras provision is only made for the issue of an office copy of entries.[37] In other jurisdictions this duplicate is called variously certificate of title, duplicate certificate of title, land certificate, certificate of ownership.[38] In seven Australasian jurisdictions, and in Manitoba, Trinidad-Tobago, Jamaica, and Leeward Islands,[39] the "certificate of title" is directed to be "in duplicate": in Saskatchewan, Alberta, and North-West Territories,[40] a "duplicate" of the certificate of title is directed to be issued or delivered to the owner after the registration is complete:—the character and effect of the document delivered to the owner seems to be the same

[35] N. S. W. 1900, s. 34; Tr. 1902, s. 38.

[36] I. 1891, s. 74; N. S. W. 1900, s. 33; Q. 1861, s. 33; S. A. 1886, s. 77; Tas. 1862, s. 32; V. 1915, s. 62; W. A. 1893, s. 59; N. Z. 1915, s. 62; Tr. 1902, s. 34; J. 1888, s. 49.

[37] B. H. 1914, s. 39.

[38] As explained under "Nomenclature," *ante,* p. 22, the expression "certificate of title" is here generally used to denote all these various duplicate documents. On the relation between the original and the duplicate—the register and the certificate of title—in England, Australia, and Canada respectively, see Own. & Inc. 82, 262; Aust. Torr. Syst. 761; Can. Torr. Syst. 58; *Toronto General Trusts Corp.* v. *Rex* (1917) 56 Can. S. C. R. 26, affd. by Privy Council [1919] A. C. 679.

[39] N. S. W. 1900, s. 33; Q. 1861, s. 33; S. A. 1886, s. 48; Tas. 1862, s. 32; V. 1915, ss. 47, 62; W. A. 1893, ss. 48, 59; N. Z. 1915, ss. 35, 61; M. 1913, ss. 49, 73; Tr. 1902, ss. 21, 34; J. 1888, ss. 40, 49; L. Is. 1886 (1914) ss. 3, 12, 13.

[40] Sas. 1917, ss. 44, 46; Al. 1906, ss. 29, 36; Can. 1906, ss. 50, 67.

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in either case. In British Columbia [41] the issue "in duplicate" only takes place in the case of fully warranted title; in other cases "a certificate of title" is issued to the owner. In England and Ireland a "land certificate," and in Ontario a "certificate of ownership" is delivered to the owner.[42]

In some cases, where there are separate registrations of ownership of distinct estates or interests in the land, more than one certificate of title may be issued in respect of what is physically the same land, the general (though not invariable) rule being that one duplicate—and one only—issues for every separate and distinct registration of ownership. The ordinary cases are those of leasehold and freehold, life tenant and remainderman, and co-owners. Where leasehold and freehold in the same land are each the subject of initial registration, each owner is usually registered separately and receives a certificate of title; New South Wales and Trinidad-Tobago constitute exceptions (*ante,* p. 25). Only in Queensland, Alberta, and North-West Territories,[43] can a life tenant alone apply as of right for initial registration; whether the remainderman would be registered in the same way and receive a separate certificate of title is perhaps doubtful. In New South Wales and Queensland [44] express enactments deal with the registration of remaindermen subsequently to that of life tenant, but it is not clear whether the remainderman would receive a separate certificate of title. In South Australia and Tasmania [45] provision is made for a remainderman to be registered separately (receiving a separate certificate of title) at his option. In New Zealand it has been held that the existence of the estate in remainder should be stated in the body of the life tenant's register and certificate of title, and should not be entered on the register merely by way of endorsement; the statute does not contemplate the separate registration of a remainder,[46] and the remainderman would not therefore receive a separate certificate of title.

The question of the right of co-owners to certificates of title is only referred to in some of the statutes. In some jurisdictions undivided interests cannot be the subject of separate initial applications (*ante,* p. 25), but where such an application is made the owner will on registration receive a certificate of title in the usual

[41] B. C. 1911, ss. 19, 20.

[42] Eng. 1875, s. 10, and 1897, s. 8, and 1903-8 Rules, rr. 65, 258; I. 1891, s. 31, and 1910 O. 8; On. 1914, ss. 14, 15, and 1911 Rules, r. 47.

[43] As to these, see *ante,* p. 31.

[44] N. S. W. 1900, s. 102; Q. 1861, s. 36.

[45] S. A. 1886, s. 75; Tas. 1862, s. 89, and 1886, s. 16.

[46] *Ex p. Matheson* (1914) 33 N. Z. R. 838; N. Z. 1915, ss. 61, 87.

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way. There is no uniformity as to the registration and issue of certificates of title in the case of co-owners. In England [47] co-owners are registered "under one title unless the registrar shall otherwise direct"; presumably each would receive, on being separately registered, a "land certificate." In Ireland,[48] apparently, tenants in common may be registered separately, and each then receives a "land certificate," while joint tenants are registered together and receive only one "land certificate." In Ontario [49] co-owners must be all registered together, but may receive one "certificate of ownership" or separate certificates. In the Australasian jurisdictions, British Columbia, Trinidad-Tobago, and Jamaica, the registration and the issue of certificate of title correspond exactly; in New South Wales [50] both joint tenants and tenants in common must be registered separately, whilst in Trinidad-Tobago [51] they may be registered either together or separately; in Queensland [52] tenants in common must be registered separately, whilst in South Australia, Tasmania, Victoria, Western Australia, New Zealand, British Columbia, and Jamaica,[53] tenants in common may be registered either together or separately.

4. Provision is made in the majority of the statutes for placing on the documents, which prior to the registration constituted the owner's muniments of title, some notification of the fact of the land being registered, and for the future custody of these documents. In some jurisdictions the notification of the new registration has to be recorded at the deeds registry. In Manitoba, Saskatchewan, Alberta, and North-West Territories, the statutes are silent on both these points, but the Australian plan of retaining the title deeds in the registry is in practice adopted.[54] It seems to be implied by other enactments in Saskatchewan, Alberta, and North-West Territories,[55] that any documents so retained are open to public inspection. The British Honduras statute is silent on both these points. In Ontario nothing is said as to marking and custody of deeds, but provision is made for recording the initial registration at the deeds registry.[56]

[47] Eng. 1875, s. 10; 1897, s. 14; 1903-8 Rules, r. 77.

[48] I. 1891, ss. 31, 64; 1910 O. 8, r. 3.

[49] On. 1914, ss. 8, 96.

[50] N. S. W. 1900, s. 100.

[51] Tr. 1902, ss. 63, 64.

[52] Q. 1861, s. 40.

[53] S. A. 1886, s. 74; Tas. 1886, s. 15; V. 1915, s. 63; W. A. 1893, s. 60; N. Z. 1915, s. 65; B. C. 1911, s. 20C (2); J. 1888, s. 50. In New Zealand, apparently, separate registration is necessary if an undivided interest is to be dealt with.

[54] Can. Torr. Syst. 73, 74. Presumably this only applies to documents relating solely to the registered land.

[55] Sas. 1917, s. 20; Al. 1906, s. 17; Can. 1906, s. 38.

[56] On. 1914, s. 15; 1911 Rules, r. 10.

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In England the statutes and rules—exceptions in this respect—do not require the title deeds to be retained in the registry, but provision is made for marking them in such a way as to disclose the fact of the land being registered.[57] In the Leeward Islands—also exceptional—the title deeds are to be retained in the registry, but no provision is made for returning to the owner deeds relating to other property, or for marking any of them with notice of the registration.[58]

In the remaining jurisdictions—Ireland, British Columbia, Trinidad-Tobago, Jamaica, and the seven Australasian jurisdictions [59]—the statutes provide for the marking of the deeds and the retention in the registry of such of them as relate solely to the registered land. In New South Wales, Queensland, Tasmania, New Zealand, and Trinidad-Tobago, the word "cancel" is used, but this appears to mean no more than endorsing a note of the new registration. The eleven enactments above referred to, except those of Ireland, British Columbia, and Queensland, also provide that the deeds thus retained at the registry are not to be open to public inspection, and this seems to be implied in Ireland by another rule.[60] In Queensland the right of public inspection is expressly, and in British Columbia impliedly, conferred by other enactments.[61] In Ireland, Victoria, Trinidad-Tobago, and Jamaica,[62] provision is also made for recording the initial registration at the deeds registry.

The object of marking the title deeds and otherwise recording the initial registration is, in the words of the English and Irish enactments, "that the fact of the registration [may not] be concealed from a purchaser or other person dealing with the land." That there is a danger of the old title deeds being fraudulently used is shewn by two Australian cases, in which money was raised on the deeds subsequently to the land being registered.[63]

[57] Eng. 1875, s. 72. A former rule (1903 Rules, r. 24) relating to custody of deeds is now repealed.

[58] L. Is. 1886 (1914) ss. 5, 12, 13.

[59] I. 1891, s. 68, and 1910 O. 3, r. 11; B. C. 1911, ss. 31, 169; Tr. 1902, s. 28; J. 1888, s. 31; N. S. W. 1900, s. 29; Q. 1861, s. 30; S. A. 1886, s. 42; Tas. 1862, s. 26; V. 1915, ss. 34, 35; W. A. 1893, ss. 35, 36; N. Z. 1915, s. 30.

[60] I. 1910, O. 3, r. 2.

[61] Q. 1877, s. 50, abrogating Q. 1861, s. 46; B. C. 1911, s. 147. And see Aust. Torr. Syst. 754. The Queensland enactment is followed in Papua (P. 1913, s. 124), and all deposited documents are open to public inspection.

[62] I. 1891, s. 19 (4), and 1910 O. 2, r. 9; V. 1915, ss. 34, 35; Tr. 1902, s. 18; J. 1889, s. 37.

[63] *Rex* v. *White* (1904) 4 S. R. (N. S. W.) 379; *Reg.* v. *Thompson* (1882) 8 V. L. R. L. 12. The fraud in the latter case led to a claim being made, though unsuccessfully, on the assurance fund: *Oakden* v. *Gibbs*, *ib.* 380.

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Other points in the third and final stage of proceedings for initial registration on voluntary application also apply in jurisdictions in which there is no provision for voluntary applications. As to the actual moment of registration becoming operative: Papua, Fiji, Federated Malay States.[64] As to relation back of the registration in some cases: Papua.[65] As to incumbrances outstanding at the time of initial registration: Papua, Fiji.[66] As to issue of duplicate documents of title: Papua, Fiji, Federated Malay States.[67] As to stating the fact of an owner being under some disability: Papua.[68]

The initial registration being now complete, the land is for the future, and while it remains on the register, subject to the rules of the new system so far as these modify the general law. Two points require mention here: the publicity of the register, and the relation of the new register to any existing deeds registry.

Only in England and Ontario is it enacted that the register shall not be open to public inspection.[69] In Fiji, Manitoba, Leeward Islands and Federated Malay States, the statutes make no express provision on this point, but the obvious intention is that the register shall be open to public inspection, and in all four "search" is one of the items for which a fee is payable. In British Columbia, Saskatchewan, Alberta, and North-West Territories,[70] publicity is implied by enactments enabling copies of the register and documents to be demanded. In all other jurisdictions—Ireland, New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Papua, New Zealand, British Honduras, Trinidad-Tobago, Jamaica[71]—it is enacted, either expressly or by necessary implication, that the register shall be open to public inspection. This does not, however, make documents such as plans which are at the registry public documents for the purpose of admissibility as evidence.[72]

The general principle as to deeds registries already in existence is that the land on the new register is not affected by them. The

[64] P. 1913, ss. 20, 32; Fi. 1876 (1906), s. 34; F. M. S. 1911, ss. 20, 28.
[65] P. 1913, s. 104.
[66] P. 1913, s. 18; Fi. 1876 (1906) ss. 10, 11.
[67] P. 1913, ss. 18, 32; Fi. 1876 (1906) s. 9; F. M. S. 1911, ss. 6, 27.
[68] P. 1913, s. 18.
[69] Eng. 1875, s. 104, and 1903-8 Rules, rr. 284-295; On. 1914, s. 137.
[70] B. C. 1911, s. 147; Sas. 1917, s. 20; Al. 1906, s. 17; Can. 1906, s. 38.
[71] I. 1891, s. 94 (1) (k), and 1910 O. 3, r. 2; N. S. W. 1900, ss. 115, 116; Q. 1861, ss. 121, 122; S. A. 1886, s. 65; Tas. 1862, ss. 105, 106; V. 1915, ss. 196, 280; W. A. 1893, ss. 146, 239; P. 1913, ss. 123, 124; N. Z. 1915, ss. 41, 42; B. H. 1914, s. 39; Tr. 1902, s. 50; J. 1888, s. 132.
[72] *Everingham* v. *Penrith Municipality* (1916) 16 S. R. (N. S. W.) 238.

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new system itself makes sufficient provision for registration of transactions. In sixteen jurisdictions only are there separate deeds registries. In British Columbia the registration statutes themselves provide for registration of instruments relating to unregistered as well as registered land. In other jurisdictions—Papua, Saskatchewan, Alberta, North-West Territories,[73] Federated Malay States—there is no deeds registry at all for transactions with unregistered land.

Of the sixteen jurisdictions in which separate deeds registries exist, in nine—New South Wales, Queensland, South Australia, Tasmania, Western Australia, New Zealand, Fiji, British Honduras, and Trinidad-Tobago—the registration statutes themselves contain no specific reference to deeds registries in connexion with initial registration, but in five of these jurisdictions it is either enacted by other statutes or declared by judicial decision or opinion that instruments registrable at the titles registry under the new system are not to be registered elsewhere, and that in general the deeds registries have no concern with interests in registered land. These five jurisdictions are: New South Wales, Queensland, New Zealand, Fiji, and British Honduras.[74] The above general rule (with one exception) appears to apply equally in South Australia, Tasmania, Western Australia, and Trinidad-Tobago.

In seven jurisdictions—England, Ireland, Ontario, Manitoba Victoria, Jamaica, Leeward Islands[75]—the same general rule (with an exception) that the deeds registry has no concern with interests in registered land, is more or less explicitly enacted. In Jamaica the enactment is least explicit, and in Manitoba an express, and in Leeward Islands an implied, exception is made with respect to contracts and instruments operating as such. In Ontario and Victoria[76] the enactment is also contained in other statutes.

[73] In the North-West Territories (which formerly included what are now the provinces of Saskatchewan and Alberta) the registry existing in 1886 seems to have been absorbed into the present registry on the introduction of registration of title. There is an historical note on this subject in *Re Canadian Pacific Ry.* (1899) 4 Terr. R. 227. See also Can. Torr. Syst. 69.

[74] New South Wales—Registration of Deeds Act 1897 (No. 22) s. 6. Queensland—*Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75, 77, 88. New Zealand—Deeds Registration Act 1908 (No. 40) s. 2. Fiji—Registration Ordinance 1897 (No. 4 in 1906 ed.), s. 4; *In re West* (1890) Udal's Fiji R. 227, 229. British Honduras—Recording of Deeds Act (1914) c. 180, s. 2. And see Aust. Torr. Syst. 755, 756.

[75] Eng. 1875. s. 127; I. 1891, s. 19; On. 1914, s. 15. and 1911 Rules, r. 10; M. 1913, ss. 14, 29, 30, 37; V. 1915, s. 57; J. 1889, s. 37, and 1903, s. 3; L. Is. 1886 (1914) s. 6. And see *Sander* v. *Twigg* (1887) 13 V. L. R. 765, 773, 774, and preceding note.

[76] Ontario—Registry Act (R. S. 1914. c. 124) ss. 3, 4. Victoria—Real Property Act 1915 (No. 2719) s. 124.

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The above cited sections of the English Act (as amended) and the Irish Act are expressly worded so as to apply only to the actual estate or interest that has been placed on the register, and not to estates or interests excepted from the initial registration of the land. This appears to be the proper construction of the enactments in other jurisdictions.

The exception above mentioned to the generality of the rule as to the exclusion from deeds registries of all instruments relating to registered land occurs in Trinidad-Tobago and Leeward Islands.[77] There a collateral trust instrument may, instead of being merely filed for reference in the titles registry, be actually registered in the deeds registry. This is referred to in Chap. V. Sect. 2, *post*—"Trusts, their protection and enforcement."

Independently of any question as to ordinary deeds registries, it has been held that, where registration is by some general statute (as a Companies Act) made essential to the validity of an instrument or transaction, this requirement of the general statute is sufficiently complied with by registration at a titles registry, when the land affected is registered land.[78]

SECTION 3.—REMOVAL OF LAND FROM THE REGISTER.

There appear to be only six jurisdictions—England, Ireland, Ontario, Manitoba, South Australia, and Western Australia[1]—in which the statutes expressly refer to the removal of land from the register after initial registration. In South Australia this removal is forbidden; in the other five jurisdictions it is permitted, in Ontario and Manitoba on "special circumstances" being shewn, and in England, Ireland, and Western Australia under certain circumstances only. In England removal is permitted when the land is not in a compulsory area; in Ireland where the owner is "full owner" and the initial registration has been voluntary; in Western Australia when the Crown has become registered owner.

There seems little doubt that, apart from special enactment, the general intention of the statutes is that land once placed on the register shall remain there.[2] A difficulty however occurs in regard to the case of land that has escheated or reverted to the Crown. It has been said by the Privy Council that in such a case

[77] Tr. 1902, s. 116; L. Is. 1886 (1914) s. 26.

[78] *Coronation Gold Mining Syndicate to Collins* [1911] V. L. R. 78.

[1] Eng. 1897, s. 17, and 1903-8 Rules, r. 95; I. 1891, s. 20, and 1910 O. 4, rr. 33, 34; On. 1914, s. 129, and 1911 Rules, r. 69; M. 1913, s. 53; S. A. 1886, s. 8; W. A. 1896, s. 6. And see Own. & Inc. 83; Aust. Torr. Syst. 716, 719; Can. Torr. Syst. 125.

[2] Some cases are cited in Aust. Torr. Syst. 716.

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the land might no longer remain on the register.[3] This dictum would not necessarily apply in every jurisdiction, and the better opinion seems to be that in any jurisdiction in which provision is made for the Crown being a registered owner, the mere fact of escheat or reverter to the Crown would not cause the de-registration of the land.

In England, Ireland, Ontario, and Manitoba, the enactments above cited also provide that on removal from the register the land is to be again subject to the existing deeds registries. This would also be implied in Western Australia, as in any other jurisdiction in which de-registration was held possible.

In England land has been allowed to be removed from the register by a mortgagee who had foreclosed under a title paramount to the registered title, the land having been initially registered subject to the mortgage as an incumbrance.[4]

[3] *Belize Estate Co.* v. *Quilter* [1897] A. C. 367, 372, under the British Honduras statute.

[4] See Eng. 1903-8 Rules, r. 151, as to the power of the registrar in cases of paramount title. The case referred to in the text occurred in the year 1917.

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CHAPTER III.—POSSESSION AND REGISTRATION.

SECTION 1.—POSSESSION BEFORE INITIAL REGISTRATION.

One of the objects and results of initial registration is that the register becomes (with some exceptions) conclusive evidence of title, and interests in the land that do not appear on the register are abrogated and disappear as enforceable rights of property. The whole subject of the conclusiveness of the register and the exceptions to this conclusiveness is dealt with in Chapter IV, *post.* The present Chapter is concerned with one particular exception—Possession. The separate treatment of this topic is justified by the fact that it is an exception of great theoretical and practical importance, and one of the few matters of principle on which the various statutory systems are not uniform. In some jurisdictions the statutes expressly save the rights of persons in possession of land from the "wet sponge" effect of registration, but in some of these again a sharp distinction is drawn between possession before initial registration and possession afterwards.[1]

The question of the extent to which possession at the time of initial registration prevails against the registered title is thus distinct from the question of the effect and value of rights acquired by possession after initial registration, and the latter part of the subject is dealt with in the next Section, *post.* The present Section is concerned only with possession existing before and at the time of initial registration, and the extent to which rights under that possession are retained by the occupiers in spite of the registration of another person as owner.

The general theory of the effect of registration is that it replaces possession as the ordinary badge of ownership. There are instances of the statutes — as in Queensland and Papua[2] — expressly making registration equivalent to possession for some purposes. The earliest of the different lines of statutes from which the present statutes have principally been derived contained no exception in favour of the rights of persons in possession, other than (in some cases) short occupation leases.[3] Possession, how-

[1] See Aust. Torr. Syst 805-815; Jour. Comp. Leg. xv. 83 (1915)—"The relation of Adverse Possession and Registration of Title."

[2] Q. 1861. s. 125; P. 1913. s. 146.

[3] South Australia—Real Property Act (1857-8, No. 15) printed as an appendix in Niblack's Analysis of Torrens System, p. 381; Aust. Torr.

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ever, seems to have been one of "the principles of English law" which "it was found could not be entirely ignored with advantage even under the new system."[4] Mistakes have sometimes been made, and the ownership of persons in possession of their land has been ousted by a registered title obtained without their knowledge.[5] A practice grew up in some jurisdictions of registering an applicant as owner subject to "any rights subsisting under any adverse possession of the land," when the applicant's own possession was not satisfactorily proved.[6] This adverse possession, a note of which was made on the register, was held to be "an estate or interest or incumbrance, subject to which the registered proprietor takes"; in the absence of any such note on the register, the registered title—at any rate in the hands of a transferee—would have prevailed over that of the person in possession.[7] Being thus defeasible, this interest of the person in possession was in the nature of an equitable interest, operating by way of notice to purchasers.

The plan of expressly noting adverse possession on the register, in order to prevent rights under it being defeated, was soon abandoned in Victoria in favour of the scheme embodied in the present statutes;[8] it was enacted that registration should in all cases be "subject to" any rights subsisting under any "adverse possession," following the wording of the clause formerly employed for endorsement on the register, and the same scheme is in force in Western Australia.[9] The interest of the person in possession thus

Syst. 22, 31. British Honduras—Honduras Lands' Titles Acts, 1858 and 1859 (21 Vict. c. 10, 22 Vict. c. 18).; Aust. Torr. Syst. 20. British Columbia—Land Registry Act 1861 (No. 8). England—Land Registry Act 1862 (c. 53).

[4] The quoted words are from *In re Martin* [1900] S. A. R. 69. 79, affd. by Privy Council *sub nom. McEacharn* v. *Colton* [1902] A. C. 104.

[5] Illustrations are: *Bonnin* v. *Andrews* (1878) 12 S. A. R. 153; *Hamilton* v. *Iredale* (1903) 3 S. R. (N. S. W.) 535.

[6] *Fergie* v. *Byrne* (1866) 3 W. W. & a'B. L. 56; *Murphy* v. *Michel* (1867) 4 W. W. & a'B. L. 13. These cases were decided in Victoria, under the Real Property Act 1862 (No. 140), which formed the model for the New South Wales statute of 1862 (No. 9), and was subsequently replaced by the statute of 1866 (No. 301) on which the present statute (V. 1915) is based.

[7] *Murphy* v. *Michel*, *supra*. The adverse possession, being a qualification on the registered title and excepted from the registration, might be compared to the interest protected under the Irish statute by the register being marked "subject to equities": see I. 1891, s. 29.

[8] *Staughton* v. *Brown* (1875) 1 V. L. R. L. 150.

[9] V. 1915, s. 72; W. A. 1893. s. 68. This does not mean that initial registration is effected regardless of possession. In all jurisdictions adverse possession would be a blot on the title to be removed before the land was registered, if brought to the notice of the registry.

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ceased to be defeasible, and became a statutory and legal interest operating irrespectively of notice to purchasers.[10] In some other jurisdictions initial registration is made subject only to the title of persons who are in adverse possession and rightly "entitled"; this is so in South Australia, Tasmania, New Zealand, British Columbia, Manitoba, and Saskatchewan.[11] In England and Ireland [12] some rights under possession, but not all, are protected against the effect of initial registration. In most of the remaining jurisdictions the protection expressly accorded to possession by the statutes is, where the registered title is fully warranted, either *nil* or limited to short leases or tenancies. In British Honduras, Trinidad-Tobago, and Jamaica,[13] the necessity for such protection is obviated by the provision that an applicant for initial registration must be in possession (*ante*, p. 49).

The twenty-two jurisdictions exhibit broadly three phases of the relation between registration and possession existing before initial registration, and may thus be divided into the three following groups:

1. Those in which mere possession may be superior to registration.
2. Those in which title coupled with possession is superior to registration.
3. Those in which possession (except in some cases under occupation leases or short tenancies) is inferior to registration.

1. *Possession superior to registration.*—Victoria and Western Australia exhibit this phase in its extreme form. The statutes [14] enact that "land" on the register is to be "subject . . . to any "rights subsisting under any adverse possession of such land . . . "and also, where the possession is not adverse, to the interest of any "tenant of the land," although these are not "specially notified as incumbrances" on the register. Provision is also made for the register being rectified in favour of any person who claims to have "acquired" a title by possession against the registered owner; the enactments in the two jurisdictions are differently framed, but appear to have the same scope.[15] In these enactments

[10] *Robertson* v. *Keith* (1870) 1 V. R. 11; *Staughton* v. *Brown*, *supra*; *Lake* v. *Jones* (1889) 15 V. L. R. 728.

[11] S. A. 1886, s. 69 (6); Tas. 1862, s. 135; N. Z. 1915, s. 72; B. C. 1911, s. 22; M. 1913, s. 82; Sas. 1917, s. 61.

[12] Eng. 1897, s 12; I. 1891, s. 52.

[13] B. H. 1914, s. 7; Tr. 1902, s. 11; J. 1888, s. 22.

[14] V. 1915, s. 72; W. A. 1893, s. 68.

[15] V. 1915, ss. 87-104; W. A. 1893, ss. 222-225.

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—both those relating to the substantive rights of persons in possession and those dealing with procedure—no distinction is made between possession prior to, and possession subsequent to, initial registration; cases on rights acquired by possession prior to the land being placed on the register apply equally where rights have been acquired subsequently, and vice versâ.

The effect of these enactments, as regards rights of persons in possession at the time of the land being placed on the register, is that the initial registration draws no line across these rights and does not abrogate them in any degree. If a title by possession is in process of being acquired, but the time limit prescribed by the relevant limitation statute has not expired, the running of the statute is not stopped, and a title by possession may possibly yet mature. If such a title has already matured, the registration will afford the registered owner no protection; the person in possession can set up his length of possession as a defence,[16] or he may take active steps to have the register rectified.[17] If the person in possession is a tenant only, his tenancy, and all rights springing out of it, are preserved intact, and are unaffected by the registered title.[18] The interest of a tenant has been construed so as to include every kind of occupation, from tenancy at will to a right to the fee simple, so that the enactments saving the rights of those in possession—adversely or non-adversely—in effect provide for all cases of possession, whether it be that of a mere intruder or of a person claiming as of right under a title good at law or in equity.[19]

Although not expressly and plainly provided for in Victoria and Western Australia, these enactments do thus—as judicially construed— cover the case of a person in possession of land under a good title, documentary or otherwise, inconsistent with or "adverse" to the title of an owner registered in respect of the same land, notwithstanding that there is no relation of landlord and tenant in the ordinary sense.[20] Cases of small encroachments between adjoining owners, particularly if buildings are concerned, may also—though this is not always expressly done—be referred to the operation of these enactments, where the registered title has

[16] *Staughton* v. *Brown*, and *Lake* v. *Jones*, *supra*.

[17] *Murdoch* v. *Registrar of Titles* [1913] V. L. R. 75 (though a title by possession was in this case held not to have been shewn); *Tuckett* v. *Brice* [1917] V. L. R. 36, 60.

[18] Cases cited in Aust. Torr. Syst. 812, where a quotation is given from *Sandhurst Build. Soc.* v. *Gissing* (1889) 15 V. L. R. 329; *Wilson* v. *Equity Trustees Co.* [1911] V. L. R. 481.

[19] Cases in preceding note, and particularly *Robertson* v. *Keith* (1870) 1 V. R. 11; *Commercial Bank* v. *McCaskill* (1897) 23 V. L. R. 10.

[20] See particularly *Robertson* v. *Keith*, *supra*, and *Black* v. *Poole* (1895) 16 Aust. L. T. 155.

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been held inferior to that of the owner in possession of a strip of land wrongfully included in the registered title.[21]

In the event of the registered owner taking proceedings by action to recover the land, the register will be sufficient primâ facie evidence of his title and his right to possession; proof of possession by the defendant for the statutory period under the appropriate limitation statute will defeat this primâ facie case, and the registered owner will not be entitled to recover the land.[22] The registered owner will succeed in the event of the person in possession setting up a defence of adverse possession under the limitation statute and failing to shew a sufficiently long period of possession.[23] But the defendant in possession may be able to set up a case of tenancy coupled with equitable right under a contract connected with the tenancy, and this may amount to a composite interest superior to the title of the registered owner, who will accordingly fail to recover the land.[24] The defendant may also be able to shew a good title inconsistent with the registered title otherwise than as a mere tenant, in which case also the plaintiff (registered owner) will fail to recover.[25]

Prior to the year 1880 in Western Australia and the year 1904 in Victoria, the statutes provided no means of rectifying the register in favour of the person who was in possession and had a title superior to the registered title, though an action could be brought for rectification under the general jurisdiction of the Court.[26] Amending enactments were passed making special provision for registering the new title in place of the existing registered title.[27]

[21] See *Fergie* v. *Byrne* (1866) 3 W. W. & a'B. L. 56; *Pleasance* v. *Allen* (1889) 15 V. L. R. 601, observed upon in *Zachariah* v. *Morrow* (1915) 34 N. Z. R. 885. Against these two Victorian cases must be set *West Australian Ice Co.* v. *Freecorn* (1904) 7 W. A. R. 22, where the registered title prevailed. But this Western Australian decision seems opposed to the principles of the Victorian cases, and is also unsatisfactory as purporting to follow a New South Wales case, though in the New South Wales statute rights of possession are not saved as against the registered title.

[22] *Murphy* v. *Michel* (1867) 4 W. W. & a'B. L. 13; *Staughton* v. *Brown* (1875) 1 V. L. R. L. 150; *Lake* v. *Jones* (1889) 15 V. L. R. 728.

[23] *West Australian Ice Co.* v. *Freecorn* (1904) 7 W. A. R. 22.

[24] *Sandhurst Build. Soc.* v. *Gissing* (1889) 15 V. L. R. 329; *Commercial Bank* v. *McCaskill* (1897) 23 V. L. R. 10.

[25] *Robertson* v. *Keith* (1870) 1 V. R. 11, where the plaintiff in the reported case had been defendant in an ejectment action; *Black* v. *Poole* (1895) 16 Aust. L. T. 155; *Pleasance* v. *Allen* (note 21, *supra*). But see *West Australian Ice Co.* v. *Freecorn*, *supra*.

[26] *Robertson* v. *Keith*, *supra*; *In re Allen* (1896) 22 V. L. R. 24.

[27] W. A. 1893 ss. 222-225; V. 1915, ss. 87-104; *Tuckett* v. *Brice* [1917] V. L. R. 36, 60. The Western Australian enactments are a re-enactment of those of 1880. The Victorian enactments of 1904 were repealed in 1914 and replaced by others drafted differently, and the latter are now re-enacted in the present statute.

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These amending enactments expressly referred to title acquired by length of possession under limitation statutes, and the present Western Australian enactment is unaltered; in Victoria the present enactment refers only to the acquisition of a "title by possession," but the difference appears to be one of language only, and the reference still seems to be only to title by length of adverse possession and not to title acquired by a tenant by means of contractual rights in connexion with the tenancy, or to the case of a person holding under a good title otherwise than as a tenant.[28] If this is so, in both jurisdictions the procedure for enabling a person in possession to take proceedings as plaintiff against the registered owner, and have the register rectified in his favour, will apply only where a title by length of possession under limitation statutes is claimed, and not to cases of possession under tenancy, equitable rights, or title otherwise good.[29]

The person in possession cannot take proceedings under these enactments for rectification unless the land has been formally placed on the register.[30] Where the claim is based on length of possession, possession for the requisite length of time must of course be proved, and if when the possession began and the action is brought the owner is unascertained, it has been laid down that possession must be proved for the full period allowed by the limitation statute in case of disabilities.[31]

There are only two other jurisdictions—England and Ireland[32]—in which inchoate rights under possession at the time of initial registration are included in the rights expressly saved from the effect of registration; but the effect of possession is not so wide or so conclusive as in Victoria and Western Australia.

All registered land is in England subject to occupation tenancies for 21 years and under "or for any less estate"; in Ireland to occupation tenancies, for 31 years and under "or for any less estate," and all "statutory tenancies" (tenancies under the Irish Land Acts). This exception of "tenancies" from the effect of registration is not the same as the exception in Victoria of "the

[28] See *Tuckett* v. *Brice*, *supra*. It may be however that the substitution of "possession" in the present enactment for "adverse possession" in the former enactment (V. 1904) has had the effect of giving all persons in possession the right of rectification. Even under the V. 1904 the title by possession might have been "based upon a contract of sale from the registered proprietor to the applicant" (s. 23).

[29] *Murdoch* v. *Registrar of Titles* [1913] V. L. R. 75; *Tuckett* v. *Brice*, *supra*.

[30] *Burns* v. *Registrar of Titles* [1912] V. L. R. 29.

[31] *Lambourne* v. *Hosken* [1912] V. L. R. 394.

[32] Eng. 1875. s. 18; 1897. s. 12. I. 1891. ss. 47. 52.

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interest of any tenant," and the principle of the cases on the construction of the Victorian enactment would not apparently apply. It would seem therefore that a "tenant" with an agreement for purchase of the freehold would not have such a title to the fee simple as to enable him to override the registered title.

These statutes contain special enactments on the subject of acquiring title to registered land by length of possession, and both English and Irish enactments are difficult to interpret with confidence. In England,[33] among interests to which all registered land is subject are "rights acquired or in course of being acquired under the Limitation Acts," so that initial registration would not affect the rights of a person who had actually acquired a good title by possession, and his possession and title should be superior to the registered title. The rights of a person who had not yet gained a complete title by possession would also remain unaffected until the registered owner established his own title to possession. Thus, under this enactment taken by itself (amendment to s. 18 of the 1875 Act) initial registration would draw no line across any rights of persons in possession and relying solely on the Limitation Acts. But the enactment is expressly made subject to the provisions of the "Land Transfer Act 1897" (s. 12). That section does not prejudice claims of persons in possession when the registration is with "possessory" title only, so that as regards "possessory" title the amendment to s. 18 applies completely. With regard to fully warranted or "absolute" title, s. 12 of the 1897 Act does modify the amendment to s. 18. Whilst declaring that a title adverse to the registered title cannot be acquired by length of possession, rectification of the register is in some cases allowed when title by possession would have been acquired but for the registration statutes. It is necessary for the person who claims a title by long possession to obtain rectification of the register before he can assert all rights of ownership, and rectification cannot be had as against (inter alia) a registered transferee for value. Thus the registered title of a transferee for value would be superior to the title under mere possession, but until registration of such a transfer the title under possession would be superior to the registered title. It is obvious that the necessity of applying for rectification, and the risk of losing the right to rectification if a transfer for value intervenes, make the rights of a person in adverse possession at the time of initial registration much narrower and less conclusive than in Victoria and Western Australia. Nevertheless

[33] Eng. 1875, s. 18; 1897, s. 12. An illustration of the most probable meaning of the enactments is given in Br. & Sh. 327. And see Own. & Inc. 109, 110.

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initial registration does not, in England, actually draw a line across rights or title under mere length of possession.

The statute in Ireland,[34] differs from the English statutes in the absence of provision for "possessory" registered title and of any enactment expressly making registered land subject to rights under Limitation Acts. Otherwise, s. 52 is to the same effect as s. 12 of the 1897 Act in England, with this difference—that the right to rectification is not ousted by the occurrence of a registered transfer for value. The Irish section in terms refers only to length of possession "commencing after the first registration of the land." But any right or title under possession at the time of initial registration appears to be abrogated by the enactment (s. 34) which makes the register "conclusive evidence of the title of the owner."[35] This would make any reference to possession before initial registration superfluous in s. 52, and would explain why only possession commencing after initial registration is mentioned.[36] The words "where any person but for the provisions of this Act would have obtained a title by mere possession" cover (according to the view taken here) both the rights under possession existing at the time of initial registration but abrogated by s. 34, and those abrogated by s. 52. Each class of rights is preserved substantially by the right to rectification being conferred, and thus in Ireland initial registration avoids drawing a line across rights or title under mere length of possession.

One feature common to the English and Irish statutes is that, in protecting rights under possession, the word "adverse" is not used, and it is only rights or title gained by mere possession under Limitation Acts that are expressly protected. The case of a person in possession under a good paper title is not (except as to certain tenancies) provided for. The argument (available in Victoria and Western Australia) that "adverse" includes possession under a good paper title cannot be used here. Even actual possession for a period otherwise sufficient under Limitation Acts, but based on title by deed and so not a title by mere possession, would seem not to be protected as against the registered title in England and Ireland. There seems to be no escape from so interpreting

[34] I. 1891, ss. 34, 52.

[35] Cases under other statutes appear to justify this statement: see *Murphy* v. *Michel* (1867) 4 W. W. & a'B. L. 13; *Belize Estate Co.* v. *Quilter* [1897] A. C. 367, 371.

[36] This interpretation of the statute seems the better; another is given in Jurid. Rev. (1915) xxvii. 199, 200, and Jour. Comp. Leg. (1915) xv. 83, 86.

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these statutes that (say) 12 years' possession before initial registration would confer a title superior to the registered title, if based on an unauthorized occupancy, whilst possession based on a valid chain of title by deed might not do so.

2. *Title and possession superior to registration.* In six jurisdictions—South Australia, Tasmania, New Zealand, British Columbia, Manitoba, and Saskatchewan [37]—a good title coupled with actual possession may be superior to the registered title, and initial registration only draws a line across rights under possession that are merely inchoate and have not yet ripened into actual title; in Tasmania "the interest of any tenant," and in South Australia, British Columbia, Manitoba, and Saskatchewan, occupation leases or agreements for short terms (one to three years) are unaffected by the registered title, whilst in New Zealand a lease or agreement for less than three years is not invalid for want of registration.

The wording of all six enactments as to adverse possession is almost identical—"adversely in actual occupation of and rightfully entitled to" the land, though in British Columbia "possession" is substituted for "occupation." But the British Columbia and Saskatchewan enactments differ from the others in another respect, nothing being said as to the adverse possession "continuing"; in the other four enactments the title is only good if the occupier "continues" in occupation. Apparently the occupation would be sufficiently continuous if carried on by a successor in title; but at any rate a wife's occupation on her husband's death has been held insufficient.[38] These enactments make the registered title conclusive (except as to the mere possessory title called in British Columbia "absolute fee") against any adverse possession under limitation statutes that has not ripened into title, but as against the registered title a title already good by length of possession, and not lost by subsequent abandonment of occupation, is superior.[39]

These enactments also include the case of actual possession coupled with a good title, so that initial registration may be ineffective against any good title as well as one good merely by length of possession.[40] The word "adverse" means adverse to the registered title, and "rightfully entitled" means with such a title as

[37] S. A. 1886, s. 69 (6, 8); Tas. 1862, ss. 40, 135, and 1893, s. 9; N. Z. 1915, ss. 72, 93 (2); B. C. 1911, s. 22; M. 1913, ss. 78, 82; Sas. 1917, ss. 60, 61.

[38] *Burke* v. *Lock* (1910) 6 Tas. R. 73.

[39] *Featherstone* v. *Hanlon* (1886) Badg. Dig. 4; *Smith* v. *Registrar-General* [1909] S. A. R. 1.

[40] *Re Wright* (1901) 2 Nich. & Stops. 74, under Tas. 1862, s. 135.

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would support the claim to possession but for the registered title, whether this claim be by virtue of a lease from a former owner,[41] or under an independent title to the fee simple.[42]

With respect to protected tenancies, leases, or agreements for lease, the term in South Australia is one year and under, in British Columbia, Manitoba, and Saskatchewan, three years and under. In New Zealand the term is under three years, but the statute is not explicit as to such a lease receiving protection when created before initial registration, though this seems to be implied. In Tasmania the words "the interest of any tenant" are the same as those used in the Victorian and Western Australian statutes, and should apparently receive the same interpretation (*ante*, p. 77). But the protection accorded in Victoria and Western Australia to a tenant with other rights of possession clearly seems to be secured in Tasmania and the other five jurisdictions by the provision protecting persons in possession and "rightfully entitled." Thus, in South Australia, Tasmania, New Zealand, British Columbia, Manitoba, and Saskatchewan, tenants in the ordinary sense with agreements for purchase will be protected and have a title to the fee simple superior to the title conferred by initial registration.

3. *Possession inferior to registration.* In the remaining twelve jurisdictions all rights under possession, whether inchoate only or complete, and with the exception of some short leases or tenancies, are abrogated in favour of the registered title, where this is fully warranted and not merely "possessory" (as in Ontario and Leeward Islands). A line is thus drawn across these rights by the initial registration of the land. That this is so seems clear from the terms in which the conclusiveness of the register is stated in the statutes and decided cases,[43] and by the express exceptions actually made. In those statutes of the present group which expressly preserve rights acquired by long possession—as in Jamaica, Leeward Islands, Fiji, Federated Malay States—and in those which expressly forbid the acquisition of such rights—as in New South Wales and Ontario—the reference (when not so stated in terms, as is done in Jamaica) appears to be to possession after initial registration, and it seems to have been considered superfluous to refer to possession before the registration.

[41] *Franklin* v. *Ind* (1883) 17 S. A. R. 133, approved in *Zachariah* v. *Morrow* (1915) 34 N. Z. R. 885.

[42] *Re Wright*, *supra*.

[43] See *Belize Estate Co.* v. *Quilter* [1897] A. C. 367, 371; *Murphy* v. *Michel* (1867) 4 W. W. & aB. L. 13; *Featherstone* v. *Hanlon* (1886) Badg. Dig. 4; *Arnold* v. *Wallwork* (1899) 20 N. S. W. 368; *Josephson* v. *Mason* (1912) 12 S. R. (N. S. W.) 249.

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In British Honduras and Trinidad-Tobago [44] the statutes contain no express mention of rights under possession or leases being affected one way or the other by initial registration, though in both it is enacted that an applicant must be in possession of the land to entitle him to have it placed on the register. Leases in existence at the time of initial registration are not referred to in the statutes of New South Wales, Fiji, Leeward Islands, or Federated Malay States, though it is implied in New South Wales and Leeward Islands, and expressly enacted in Fiji and Federated Malay States (but apparently with reference only to transactions after initial registration) that short leases (up to three years) are independent of the register.[45] It is however held in New South Wales (and this would apply in Leeward Islands) that a short tenancy, though not necessarily invalid for all purposes, may be wiped out by the registered title of the lessor's transferee.[46]

In the remaining six jurisdictions—Ontario, Alberta, North-West Territories, Jamaica, Queensland, and Papua—tenancies or occupation leases up to three years, or (in Ontario) having up to three years "yet to run," are not affected by initial registration.[47]

This Section may be summed up by the statement that only in ten jurisdictions out of the twenty-two are rights under possession (other than short leases) saved by express enactment from the effect of initial registration; in these ten—England, Ireland, Victoria, Western Australia, South Australia, Tasmania, New Zealand, British Columbia, Manitoba, Saskatchewan—the owner in possession retains his ownership in varying degrees of security.

SECTION 2.—POSSESSION AFTER INITIAL REGISTRATION.

This Section has to do with the acquisition of rights under possession against the registered title, as distinguished from the mere retention of rights. It will be found that only in seven jurisdictions out of the twenty-two is the acquisition of rights by possession prevented by express enactment; in these seven the registered owner (with fully warranted title) is not liable to have his title set aside in favour of a new owner in possession, though ten-

[44] B. H. 1914, s. 7; Tr. 1902, s. 11.

[45] N. S. W. 1900, s. 53 (1); Fi. 1876 (1906) s. 50; L. Is. 1886 (1914) s. 56; F. M. S. 1911, s. 37.

[46] *Arnold* v. *Wallwork*, and *Josephson* v. *Mason*, *supra*.

[47] On. 1914, s. 24 (1) (*d*); Al. 1906, s. 43 (*d*); Can. 1906, s. 73 (*d*); J. 1888, s. 55; Q. 1877, s. 11; P. 1913, s. 29 (*d*). In Jamaica, Queensland, and Papua, the expression "tenancy" is used, and the word "occupation" omitted.

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ancies and occupation leases may in some instances be effectively created without being registered.

The two questions—gaining title by possession under limitation statutes, and the validity of unregistered tenancies or leases—are quite independent of each other and are best treated separately. There are three phases of the whole question treated of in this Section: (1) Where no title is acquired by mere possession; (2) Where title may be acquired by mere possession; (3) Tenancies and occupation leases.

1. *No title acquired by possession.* Whilst in most jurisdictions initial registration overrides title by possession already in existence, on the other hand when the land is once on the register title by possession can in most jurisdictions be acquired so as to override the registered title. There are seven jurisdictions only—Ontario, New South Wales, British Columbia, Manitoba, Saskatchewan, South Australia, New Zealand [1] — in which the statutes expressly provide that title by mere length of possession cannot be acquired, assuming the registered owner to have a fully warranted title. (In Ontario and British Columbia,[2] when the land is registered with possessory title only, the rights of persons in possession at the time of initial registration are not affected by the registration). The enactments are all to the same effect, though varying slightly in language, and that of Ontario is typical.

A title to any land adverse to or in derogation of the title of the registered owner shall not be acquired by any length of possession.[3]

Even a mortgagee may not be able to acquire title by mere length of possession as against the registered owner his mortgagor.[4] In Manitoba by express enactment, and in New Zealand by judicial decision, the title of a mortgagee under a registered mortgage is protected against the owner in the same way as the title of the owner himself, and the mortgagee's rights over the land are not affected by mere lapse of time.[5]

The enactments preventing the acquisition of any rights by possession against the registered title are likely to prove unwork-

[1] On. 1914, s. 29; N. S. W. 1900, s. 45; B. C. 1911, s. 22 (3); M. 1913, s. 83; Sas. 1917, s. 61; S. A. 1886, s. 251; N. Z. 1915, s. 60.

[2] On. 1914, ss. 12, 29; B. C. 1911, ss. 22, 23.

[3] This enactment is also found in Nova Scotia (Land Titles Act 1903-4 (c. 47) s. 42), and New Brunswick (Land Titles Act 1914 (c. 22) s. 44).

[4] *Smith* v. *National Trust Co.* (1912) 45 Can. S. C. R. 618, 637.

[5] M. 1913, s. 117 (also enacted as s. 24 (3) of the R. P. Lim. Act (R. S. 1913, c. 116). *Campbell* v. *Auckland Dist. Land Registrar* (1910) 29 N. Z. R. 332.

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able eventually, since land might thus remain in perpetuity as the property of an owner who had long since abandoned all claim to it.[6]

2. *Title acquired by possession.* The acquisition of title by possession under limitation statutes is provided for by express enactment in eight jurisdictions—England, Ireland, Victoria, Western Australia, Fiji, Jamaica, Leeward Islands, Federated Malay States.[7] Only in the statutes of Ireland and Jamaica is there any express reference to the adverse possession commencing after the land is registered, but (as pointed out *ante,* p. 84) the proper construction of five of the enactments (the exceptions being those of England, Victoria, and Western Australia) seems to be that the general reference to the acquisition of title by possession should be restricted to the case of possession commencing after initial registration—rights under possession being (when already in existence and not expressly preserved) abrogated by the initial registration itself. In other respects also the eight sets of enactments exhibit great variety in their form.

In Victoria and Western Australia[8] the title acquired by the person in possession is treated as a strictly legal interest against which the registered title cannot prevail, whether the adverse possession has commenced before or after initial registration, and whether the land has or has not been transferred to a purchaser. The registered title is always "subject . . . to any rights subsisting under any adverse possession," and provision is made for the register being rectified accordingly when title has been gained by sufficient length of possession. But even in the absence of any such rectification, such an owner in possession would seem to have the same power to deal with the land independently of the registered title as a person in possession before, and continuing in possession after, initial registration (*ante,* p. 77). This right to rectification may however be lost if after it has been gained by reason of long possession, the registered owner succeeds in resuming possession, or perhaps even if another person takes and holds possession.[9]

[6] A uniform enactment on this subject is suggested in Jour. Comp. Leg. xv. 83, 89 (1915), and see xviii. 272 (1918). The absence of any provision for gaining title by length of possession has been said to be "one of the great flaws in the system" in New South Wales: *Turner* v. *Myerson* (1918) 18 S. R. (N. S. W.) 133, 136.

[7] Eng. 1875, s. 18 (am.), and 1897, s. 12; I. 1891, s. 52, 1910 O. 4, r. 28; V. 1915, ss. 72, 87; W. A. 1893, ss. 68, 222; Fi. 1876 (1906), s. 14; F. M. S. 1911, s. 8; J. 1888, ss. 53, 55; L. Is. 1886 (1914), ss. 8, 34, sch. A "indefeasible."

[8] V. 1915, ss. 72, 87-104; W. A. 1893, ss. 68, 222-225.

[9] *Johnson* v. *Templeton* [1917] V. L. R. 339.

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In England, Ireland, and Leeward Islands,[10] the register is conclusive so long as it remains unrectified, the right of the person who claims by possession being a right to have the register rectified on shewing a sufficient length of possession to give title under the ordinary law. In England the right to rectification may be wholly or partially lost by the land being dealt with for value. In Ireland and Leeward Islands transactions for value appear to have no such effect on the right to rectification. In England and Leeward Islands,[11] if the registration is merely with possessory title, all adverse rights of the person in possession are preserved, as in Victoria and Western Australia. The distinction between the interest of a person whose rights are in terms preserved notwithstanding registration of the land, and that of a person to whom a statutory right of rectification is expressly given, seems to be in principle the distinction between a legal and an equitable interest. In the one case registration has no effect on the actual rights of the person in possession, in the other those rights run (in England) the risk of being defeated by a transfer for value intervening, and (in all three jurisdictions) cannot be enforced as rights of property until proceedings have been taken and the register duly rectified.

In Jamaica[12] the registered title is subject "to any rights acquired" over the land since initial registration "under any statute of limitations." In Fiji and Federated Malay States[13] the register is "subject to challenge" amongst other grounds "on the ground of adverse possession in another for the prescriptive period." In none of these three jurisdictions is any machinery provided for enforcing these rights under possession or rectifying the register at the instance of the person who has acquired title to the land. The case law in Victoria, as it stood before statutory provision was made for enabling the owner by possession to get himself formally placed on the register, seems applicable,[14] and the title acquired—even before formal registration—would seem to be (as in Victoria and Western Australia) a strictly legal one, superior to the registered title.

[10] Eng. 1897, s. 12; I. 1891, s. 52; L. Is. 1886 (1914), s. 34.

[11] Eng. 1875, ss. 8, 18 (am.); L. Is. 1886 (1914), s. 126.

[12] J. 1888, ss. 53, 55.

[13] Fi. 1876 (1906), s. 14; F. M. S. 1911, s. 8. Though the enactment in Federated Malay States is identical with that in Fiji, it has been held that a title by possession cannot be acquired in the Federated Malay States against the registered title: *Yap Leng Hin* v. *Khoo Poh Ghin* (1903) 9 Str. Sett. R. Appx. 71. The soundness of this view seems open to doubt, and the contrary view seems to be generally held: see Innes F. M. S. 61.

[14] *In re Allen* (1896) 22 V. L. R. 24; *Robertson* v. *Keith* (1870) 1 V. R. 11; *Tuckett* v. *Brice* [1917] V. L. R. 36, 60. See *ante*, p. 78.

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In seven jurisdictions—Tasmania, Queensland, Papua, Alberta, North-West Territories, British Honduras, Trinidad-Tobago—there is no express enactment as to the effect of long possession or limitation statutes. The matter has been the subject of judicial decision, and the balance of authority is in favour of the view that the limitation statutes do apply (when not expressly excluded) to registered as well as to unregistered land.

The limitation statutes have been held to apply to registered land in Tasmania,[15] Alberta,[16] and British Honduras.[17] It has been said that they do not apply in Queensland.[18] The result of the Privy Council decision on the British Honduras statute, supplemented by the Alberta cases, is that the limitation statutes apply equally whether included in the same code or consolidation as the registration statutes, or enacted separately. It is submitted that both in Queensland, and in other jurisdictions where the registration statutes are silent, the limitation statutes should be held to apply to registered land.

As to the exact method of the application of the limitation statutes, that adopted in Tasmania has some resemblance to the method enacted in the English statute (1897, s. 12), under which a registered transfer for value defeats the right of the person in possession to rectification, and in effect stops the limitation statute running (or makes it begin to run afresh) against the new registered owner. It is held in Tasmania that a title by adverse possession can only be acquired if the statutory period of 12 years has elapsed since the date of the then existing register or certificate of title; the issue of a fresh certificate of title destroys all inchoate rights under possession.[19] Such a fresh registration should on principle include the case of a transferee who is merely entered on the register as owner in place of the transferor without having a new certificate of title made out in his own name, but such a case does not fall literally within the words of the statute or the decisions on it. On the other hand a new certificate of title does not necessarily represent a transaction for value, though this is covered by the decisions. The registration (in favour of a purchaser or otherwise) of a fresh certificate of title would seem to destroy both an inchoate right and a complete title under possession. This

[15] *Featherstone* v. *Hanlon* (1886) Badg. Dig. 4; *Re Bartlett* (1907) 4 Tas. R. 26; *Burke* v. *Lock* (1910) 6 Tas. R. 73.

[16] *Harris* v. *Keith* (1911) 16 West. R. 433 (Al.); *Wallace* v. *Potter* (1913) 24 West. R. 262 (Al.).

[17] *Belize Estate Co.* v. *Quilter* [1897] A. C. 367.

[18] *Maltby* v. *Pang See* [1911] S. R. Q. 12.

[19] Cases in note 15, *supra*.

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reduces the title acquired under limitation statutes from a complete legal interest (such as exists in Victoria) to an equitable or defeasible interest, liable to be lost if rectification of the register be not obtained promptly. This right to rectification appears to follow as a natural consequence of the acquisition of a new title against the registered title.[20]

In British Honduras the question of the effect of the registration of transactions on the operation of the limitation statutes seems not to have been raised in any reported case. In Alberta it was at first doubted whether the Court was justified in making a declaration of title in favour of the person who has acquired a title by possession.[21] In a later case a declaration of title was made in favour of the title under possession, but rectification of the register was refused.[22] This seems wrong, and on the authority of the Tasmanian and Victorian cases above referred to, and the general principle of the inherent jurisdiction of the courts to control the register, the acquisition of title by possession against the registered title should carry with it the right to have the register rectified accordingly. But no declaration of title or rectification can be had as against a registered owner who has regained possession.[23]

Where the register is rectified, and the new owner placed on the register in lieu of the former registered owner, this amounts to a transfer of the former owner's fee simple to the new registered owner, though under the general law the result of the extinguishment of an owner's title by the limitation statutes is not to transfer his ownership to the new owner.[24]

The rule laid down in Tasmania is to the effect that each fresh registration of an owner—in succession to a preceding owner or otherwise—abrogates all existing rights and title that are inconsistent with the registered title, but that a person who can shew continuous adverse possession for the necessary period under limitation statutes, since the owner then on the register was placed there, acquires title against that owner and can have the register rectified accordingly. If the limitation statutes do—as seems the better opinion—apply in all jurisdictions where the statutes are

[20] *Re Bartlett* (1907) 4 Tas. R. 26. And see *In re Allen* (1896) 22 V. L. R. 24; *Robertsan* v. *Keith* (1870) 1 V. R. 11.

[21] *Harris* v. *Keith* (1911) 16 West. R. 433 (Al.).

[22] *Wallace* v. *Patter* (1913) 24 West. R. 262 (Al.). *In re Allen* and *Re Bartlett* were not cited. A Trinidad case, where a declaration of title was refused, seems to have wrongly decided: *Seecharan* v. *Jugdeo Maraj* (1909) 1 Tr. & Tob. 344.

[23] *Sinclair* v. *McLennan* [1919] 2 W. W. R. 752 (Al.).

[24] See Own. & Inc. 47, quoted with approval in Innes F. M. S. 61.

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silent on the point, there seems to be no reason why the precise method of their application should not be as laid down in Tasmanian cases, the limitation statutes beginning to run against every successive registered owner from the date of his being placed upon the register.

3. *Tenancies and occupation leases.* In most jurisdictions tenancies and occupation leases can be created independently of the registered title, in some registration is not necessary at all, in others it is permitted but is not compulsory, whilst in others again complete protection can only be secured by registration.

In nine jurisdictions—England, Ireland, Ontario, British Columbia, Manitoba, Saskatchewan, Alberta, North-West Territories, Jamaica [25]—the registered title is subject to unregistered tenancies and occupation leases of a certain length, in England 21 years "or any less estate," in Ireland 31 years "or any less estate" and all "statutory tenancies," in other jurisdictions three years. In Ireland and Manitoba provision is made for registration of leases generally, in other jurisdictions of leases other than those above-mentioned. In all nine jurisdictions the validity of these tenancies and occupation leases without registration is clearly implied, as also their superiority to the registered title. A difficulty however may occur in determining whether the interest is within the length of term protected, as for instance whether a right of renewal constitutes a lease for a longer term.[26] A sub-lease for an indefinite period by a monthly tenant is necessarily a term for less than three years.[27]

The exception of certain tenancies and leases from the effect of initial registration, and the result in cases where the tenant has an agreement for purchase of the freehold, has been referred to *ante,* p. 77. In the event of any such tenancy coming into existence after initial registration, the title of the tenant would apparently have the same relation to the registered title as if it were in existence before initial registration.

In seven jurisdictions—Queensland, South Australia, Papua, New Zealand, Fiji, Federated Malay States, Trinidad-Tobago,[28]—

[25] Eng. 1875, ss. 18 (7), 50; I. 1891, ss. 44, 47 (*h*); On. 1914, ss. 24 (1) (*d*), 70; B. C. 1911, ss. 22 (1) (*d*), 29; M. 1913, ss. 78 (*d*), 101; Sas. 1917, ss. 60 (*d*), 92; Al. 1906, ss. 43 (*d*), 54; Can. 1906, ss. 73 (*d*), 88; J. 1888, ss. 55, 70.

[26] See *St. Albert R. C. Episcopal Corp.* v. *Sheppard* (1913) 23 West. R. 282 (Al.); and a Victorian case, *Roberts* v. *Birkley* (1888) 14 V. L. R. 819.

[27] *Siau Kam Ki* v. *Tsang Heng Chun* (1912) Innes F. M. S. 167.

[28] Q. 1877, ss. 11, 18; S. A. 1886, ss. 116, 119; P. 1913, ss. 29, 41, 42; N. Z. 1915, s. 93; Fi. 1876 (1906), ss. 49, 50; F. M. S. 1911, ss. 36, 37; Tr. 1902, ss. 67, 68.

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tenancies and occupation leases (one year and under in South Australia and Fiji, under three years in New Zealand, three years and under in other cases) are not invalid for want of registration, but are expressly permitted to be registered,[29] Apparently registration adds nothing to the validity of such leases—if leases and nothing more—as against the registered title of the reversioner, though in the event of there being two competing leases registration might perhaps confer priority. But in South Australia and Papua a right of purchase or renewal is not protected against a subsequent purchaser unless the lease is registered or protected by caveat, and in Fiji and Federated Malay States a right of purchase is similarly not protected unless the lease is registered. In New Zealand and Queensland (though not in Trinidad-Tobago), these rights of purchase and renewal seem to be secure, as well as the lease itself, against the registered title—even of a purchaser.[30] And a licensee "in actual visible occupation" has the same rights as an actual tenant.[31]

New South Wales and Leeward Islands [32] stand by themselves with respect to short leases. The registered title is not made subject to any leases or tenancies, and the sections authorizing leases relate to leases "exceeding three years" (in New South Wales), and "for three years and upwards" (in Leeward Islands). The better opinion seems to be that other leases—for less than or not more than three years—are as valid against the lessor (whether in writing or not) as they would have been under the ordinary law, but that additional protection may be gained by being entered on the register in some way. The Australian cases on the New South Wales section and similar sections in other jurisdictions, some of them now repealed or amended, do not present a consistent theory with respect to these short leases.[33] The view that interprets the statutes as saying "that every pre-existing interest for less than three years shall be void" [34] must be considered as now discredited.[35] A choice has to be made between the view that regards a short lease unregistered as in the nature of a legal interest, the view that regards it rather as an equitable or defeasible interest, and a compromise between the two. All three views find expression in

[29] Illustrations in Federated Malay States are: *Siau Kam Ki* v. *Tsang Heng Chun* (1912) Innes 167; *Yio Then Sang* v. *Cheng Sing*, *ib.* 182. As to Trinidad-Tobago, see *Potter* v. *Sampson* (1913) 2 Tr. & Tob. 274.

[30] *Finnoran* v. *Weir* (1887) 5 N. Z. S. C. 280; *Rutu Peehi* v. *Davy* (1890) 9 N. Z. R. 134; *Fels* v. *Knowles* (1906) 26 N. Z. R. 604. See Tr. 1902, s. 68.

[31] *Pukuweeka Sawmills* v. *Winger* [1917] N. Z. R. 81.

[32] N. S. W. 1900, s. 53; L. Is. 1886 (1914), ss. 56, 57.

[33] See Aust. Torr. Syst. 811, 813.

[34] *Manning* v. *Crossman* (1871) 5 S. A. R. 130.

[35] See for instance *Josephson* v. *Mason* (1912) 12 S. R. (N. S. W.) 249.

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South Australian cases.[36] In Tasmania (as formerly in New Zealand) a short lease unregistered has been held to be strictly a legal interest, not affected by the provisions of the registration statutes, and indeed not capable of registration.[37] In New South Wales itself the compromise view has been adopted, and it is held that a legal tenancy (as distinguished from a mere agreement enforceable in equity) for three years or less may be created by the registered owner even without writing, but that this tenancy (though valid against the lessor himself) is liable to be displaced if not entered in some way on the register, in the event of the land being transferred on the register to a new owner.[38]

Tasmania, Victoria, and Western Australia[39] are distinguished from other jurisdictions in making the registered title subject to "the interest of any tenant," though the sections authorizing leases relate (as elsewhere) expressly to leases "exceeding three years." Leases for three years or less need not, of course, be—though they usually are—occupation leases. But for most purposes an interest under a short lease in these three jurisdictions will be sufficiently protected as "the interest of any tenant." In Victoria and Western Australia these short leases are, however, valid without registration, though they are not regarded as unregistrable[40]— the New South Wales rather than the New Zealand and Tasmanian view obtaining in this respect. The nature of the rights conferred by the saving of the tenant's interest from the effect of registration is the same, whether the tenancy be created before or after initial registration.[41] A "tenant" is "any person who is the holder in actual possession, not adverse, of the land" on the register, and the protected "interest" of such a tenant "includes all rights in respect of the land either springing out of or accompanying such actual possession";[42] thus what amounts to a

[36] *Tranter* v. *Lord* (1874) 8 S. A. R. 81; *Buckett* v. *Knobbe*, *ib.* 86: *Hunter* v. *Player* (1875) 9 S. A. R. 100.

[37] *Finnoran* v. *Weir* (1887) 5 N. Z. S. C. 280 (under a repealed Act); *Gangell* v. *Townsend* (1911) 7 Tas. R. 107. The latter case was decided under Tas. 1862, s. 47 (still in operation), and not under s. 40, which has been amended (Tas. 1893, s. 9) on the lines of the Victorian statute V. 1915, s. 72.

[38] *Arnold* v. *Wallwork* (1899) 20 N. S. W. 368; *Josephson* v. *Mason* (1912) 12 S. R. (N. S. W.) 249.

[39] Tas. 1862, ss. 40, 47; V. 1915, ss. 72, 131; W. A. 1893, ss. 68, 91. And as to sub-leases: Tas. 1893, s. 12; V. 1915, s. 139; W. A. 1893, s. 99.

[40] *Roberts* v. *Birkley* (1888) 14 V. L. R. 819; *Roberts* v. *Huntington* (1901) 3 W. A. R. 33. Guest's Transfer of Land Act 90.

[41] *Black* v. *Poole* (1895) 16 Aust. L. T. 155, follg. *Sandhurst Build. Soc.* v. *Gissing* (1889) 15 V. L. R. 329. Other cases are cited *ante*, p. 77.

[42] *Sandhurst Build. Soc.* v. *Gissing*, *supra*, at p. 331.

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fee simple title good against the registered title can be created by the registered owner letting into possession a person who is entitled to purchase the fee simple,[43] or to whom a gift of the land has been made without formal transfer.[44] No special machinery is provided—as is done in Victoria and Western Australia with respect to title gained by possession under limitation Acts—for enabling the register to be rectified, but this could be done under the general jurisdiction of the courts. These observations on "the interest of any tenant" apply equally in Tasmania, notwithstanding that the rights saved from the effect of registration do not expressly include —as is done in Victoria and Western Australia—rights by adverse possession under limitation Acts.

The creation of an ownership in the tenant which shall be superior to the registered title opens up the same possibilities as the acquirement or creation in Victoria and Western Australia of any ownership under possession which shall be superior to the registered title (*ante*, p. 77). In the case of a tenant as well as an "adverse" occupier, land on the register might be dealt with to an indefinite extent without reference to the registered title.

In the British Honduras statute no special mention is made of tenancies or leases in their relation to the registered title.

With reference to the wide variations in the effect given in different jurisdictions to possession as against the registered title, it will be noticed that Victoria and Western Australia at one end of the scale make possession superior to registration, whilst New South Wales at the other end of the scale makes registration superior to possession. This applies both to adverse possession and tenancies —both before and after initial registration. From a practical point of view the most reasonable compromise between these extremes would seem to be that adopted in South Australia and Fiji with respect to tenancies, and that adopted in England with respect to adverse possession. In the one case a short tenancy only requires registration if coupled with an agreement for purchase or renewal. In the other, title under limitation Acts can be acquired against a registered owner who will neither sell nor take the trouble to keep his land in his own possession.[45]

[43] *Sandhurst Build. Soc.* v. *Gissing*, *supra*.

[44] See *Matthews* v. *Matthews* [1913] V. L. R. 80; *Wilson* v. *Equity Trustees Co.* [1911] V. L. R. 481.

[45] See the suggested uniform enactment in Jour. Comp. Leg. (1915) xv. 83, 89.

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CHAPTER IV.—CONCLUSIVENESS OF THE REGISTER.

SECTION 1.—MEANING AND LIMITS OF CONCLUSIVENESS.

The conclusiveness of the register constitutes the State warranty of title which it is one of the purposes of the registration statutes to bring into existence. The warranted title which is conferred by the register being made conclusive is often called "indefeasible," whilst the register is sometimes spoken of as "indefeasible" and the registered title as "conclusive." It has been said that "an indefeasible title means a complete answer to all adverse claims" on mere production of the register, and that a person acquiring title from a registered owner has, on being himself registered, "an indefeasible title against all the world."[1] The cases cited illustrate the strength of the registered title, but the indefeasibility or conclusiveness has its limits and exceptions—as shewn by the preceding chapter (Chap. III) on Possession. Moreover, the two cases just cited illustrate the principle that conclusiveness may exist as regards the same property for one owner and not for a predecessor or successor in title; this is sometimes expressed by saying that the conclusiveness of the register, or the indefeasibility of title, exists for the benefit of a purchaser rather than a vendor.

The register is not literally conclusive as to every possible matter that is or might be stated in it, nor does the State warranty of title extend literally to every possible interest in the land. The owner and his property (even where the title is a fully warranted one) are still subject to the ordinary rules of law, so far as these are not altered by the registration statutes.[2] These statutes do not even purport to make the register completely conclusive, but in every one of them there are express exceptions.

The statutes make the register conclusive by enacting to the effect: (1) That the title of the registered owner is to be as stated on the register; (2) That no claims inconsistent with the title as stated on the register are to be enforced against the owner. Of these enactments the first is the most important; it is found in the statutes of all the twenty-two jurisdictions, and in fact is sufficient

[1] *Temple* v. *North Vancouver Corp.* (1913) 25 West R. 245 (B.C.); *Fels* v. *Knowles* (1906) 26 N. Z. R. 604, 620. And see *Hudson's Bay Ins. Co.* v. *Creelman* [1919] 3 W. W. R. 9 (Privy Council).

[2] *Beatty* v. *Bailey* (1912) 26 O. L. R. 145, 149; *In re Skill and Thompson* (1908) 17 O. L. R. 186, 194; *McClennan* v. *Powasson Lumber Co.* (1908) 15 O. L. R. 67, 68, affd. 17 O. L. R. 320. And see *post* as to effect of general legislation.

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without the second. The second enactment does not appear in all the statutes, but is omitted in England, Ireland, Ontario, South Australia, Leeward Islands, Fiji, and Federated Malay States.

The form of the first of these enactments varies. In England, Ireland, Ontario, and British Columbia,[3] the statutes enact that the first registered owner and transferees from registered owners take a fee simple (or leasehold, as the case may be) free from other estates and interests; only in Ireland is it expressly declared that the register is "conclusive evidence" of the owner's title. In South Australia [4] the title of the registered owner is "absolute and indefeasible," and the register is (except in certain cases) "conclusive evidence" that the person named as taking an interest is entitled to that interest. In Leeward Islands the register is "indefeasible," and in Fiji and Federated Malay States the register is "conclusive evidence" that the person named in the register "is the absolute and indefeasible owner" of the land.[5]

In Manitoba [6] the register is "conclusive evidence" that the person named is entitled to the interest "specified" in it. So in New South Wales, Queensland, Tasmania, Papua, New Zealand, Saskatchewan, Alberta, North-West Territories, and Trinidad-Tobago,[7] adding that (with certain exceptions) the registered title is free from all other estates and interests. In Victoria, Western Australia, and Jamaica,[8] the register is "conclusive evidence" that the person named as having an interest or power has that interest or power, free (with certain exceptions) from all other incumbrances. In British Honduras [9] the person who according to the register appears to be entitled "shall be entitled accordingly," "to the exclusion of all other" interests "not being equitable estates or interests."

The form of the second of the two enactments above referred to is nearly uniform in the jurisdictions in which it is found. In British Honduras,[10] after ten years from initial registration claims in respect of any legal interest ("not being an equitable interest or right") inconsistent with the registered title are "absolutely barred" and "absolutely extinguished." In the remaining juris-

[3] Eng. 1875, ss. 7-9, 13, 30-35, 38; I. 1891, ss. 30, 34, 36, 53; On. 1914, ss. 10-13, 18-20, 42-45; B. C. 1911, ss. 22, 23, 102.

[4] S. A. 1886, ss. 68-70, 80.

[5] L. Is. 1886 (1914), ss. 8, 10, 125, 126, sch. A "indefeasible," "land," "owner"; Fi. 1876 (1906), s. 14; F. M. S. 1911, ss. 8, 28.

[6] M. 1913, s. 79.

[7] N. S. W. 1900, ss. 40, 42; Q. 1861, ss. 33, 44; Tas. 1862, ss. 33, 40; P. 1913 ss. 19, 29; N. Z. 1915, ss. 58, 68; Sas. 1917, ss. 59, 174; Al. 1906, ss. 42, 44; Can. 1906, ss. 72, 174; Tr. 1902, ss. 39, 47.

[8] V. 1915, ss. 67, 72; W. A. 1893, ss. 63, 68; J. 1888, ss. 53, 55.

[9] B. H. 1914, s. 30.

[10] B. H. 1914, s. 16.

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dictions — five Canadian, seven Australasian, Trinidad-Tobago, and Jamaica [11]—it is enacted that (with certain exceptions) no action for recovery of land is to be brought against a registered owner, and the production of the register is to be a bar to any such action.

The warranty of title given by the statutory conclusiveness of the register operates in two ways, and the register has two functions—affirmative and negative respectively. Affirmatively, the register warrants that the title of the owner is as stated on the register; negatively, the warranty is that the owner's title is not affected by anything that is not stated on the register. This is equivalent for many purposes to a warranty that the owner's legal title is as it appears to be on the register, and that there are no equitable interests enforceable against the owner, other than any actually notified on the register.

So far as it is affirmatively evidence of the owner's title, the register puts him in much the same position as if his title to the legal estate had been duly investigated and found satisfactory;[12] in some respects it does more, in some less. The register, however, operates not merely by declaring good a title found to be so, but confers the title stated, notwithstanding that, but for the registration, the registered owner would have no title at all.[13] This operation of the register in actually conferring title resembles that of limitation statutes. But there is much more than a bar of legal remedies, for the title (if any) of the hostile claimant is completely abrogated and in effect transferred to the registered owner, conferring on the latter a title good against the world.[14]

[11] B. C. 1911, ss. 25A, 25B; M. 1913, ss. 84, 85; Sas. 1917, s. 159; Al. 1906. s. 104; Can. 1906, s. 142; N. S. W. 1900. s. 124; Q. 1861, s. 123; Tas. 1862, s. 124; V. 1915, s. 244; W. A. 1893 s. 199; P. 1913, s. 144; N. Z. 1915, s. 59; Tr. 1902, s. 132; J. 1888, s. 135. As to what is an action "for recovery of land," see *Sutherland* v. *Spruce Grove Municip.* [1919] 1 W. W. R. 274 (Al.).

[12] Though this is the purpose of statutes setting up registration of title, the Australasian model has been called "a very clumsy expression of an admirable principle": *Miller* v. *Dovy* (1889) 7 N. Z. R. 515, 524.

[13] *Hamilton* v. *Iredale* (1903) 3 S. R. (N. S. W.) 535; *Farah* v. *Glen Lake Mining Co.* (1908) 17 O. L. R. 1; *Kennedy* v. *Suydam* (1916) 36 O. L. R. 510; *Commonwealth* v. *State of New South Wales* (1918) 25 C. L. R. at 341, 342.

[14] See *Bonnin* v. *Andrews* (1878) 12 S. A. R. 183, approved in *Assets Co.* v. *Mere Roihi* [1905] A. C. 176, 212. The position taken in the text is illustrated by the following passage from a judgment of the Privy Council distinguishing the Jamaica Statute of Limitations from corresponding English statutes: "This possessory law is framed upon a different principle from our Statutes of Limitation. It is rather of the nature of the *usucapio* of the Roman law, or the positive prescription of the law of Scotland. It does not bar the legal remedies if the parties do not proceed within a certain time, but it converts a possession for seven years

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So far as the register is negatively evidence of title, the most important effect is that the owner is protected against the operation of the equitable doctrine of constructive notice. Equitable interests that are not notified in any way on the register are not to affect the owner as rights of property. The existence of equitable or other unregistered interests may be shown by entries on the register, and the registered title will be subject to these, but the register merely asserts their existence and gives no warranty as to their validity or the title of the persons claiming them. The register operates, in fact, with respect to those interests that are merely notified or entered on it as a kind of notice of them, though mere entry on the register is not always or necessarily effective notice to all the world; this aspect of the register's functions is referred to *post* in Sect. 6—"Notice."

In addition to the general enactments making the register conclusive evidence of title, there are scattered up and down the statutes enactments making the register conclusive for particular purposes; for instance, between vendor and purchaser,[15] notwithstanding irregularities in procedure,[16] or even notwithstanding notice of some such interest as a writ of execution.[17]

The principle of the register being conclusive for one owner and not for another is illustrated by enactments which make the registered title of a purchaser for value good, notwithstanding that the register would not have been conclusive in favour of his vendor. Some of these enactments are included in others already cited. In eight Australasian and three Canadian jurisdictions, Trinidad-Tobago, and Jamaica,[18] there are additional enactments protecting bonâ fide purchasers for value and making the register conclusive in their favour, notwithstanding exceptions which might have made it inconclusive as regards their predecessor in title. By these enactments (except in Alberta and North-West Territories) the pur-

under a deed, will, or other conveyance, into a positive, absolute title, against all the world": *Beckford* v. *Wade* (1805) 17 Ves. 87, 88; 11 R. R. 20, 21.

[15] Eng. 1897, s. 16; N. S. W. 1900, s. 44; Q. 1861, s. 96; Tas. 1862, s. 115; V. 1915, s. 71; W. A. 1893, s. 67; P. 1913, s. 31; J. 1888, s. 54; Al. 1906, s. 136; Can. 1906, s. 175.

[16] Eng. 1875, s. 92; I. 1891, s. 82 (3); On. 1914, s. 113; B. C. 1911, s. 121A; Sas. 1917, s. 208; Al. 1906, s. 45; Can. 1906, s. 193; N. S. W. 1900, s. 40 (2); Q. 1861, s. 33; Tas. 1862, s. 33; V. 1915, s. 67; W. A. 1893, s. 63; N. Z. 1915, s. 71; Tr. 1902, s. 29; J. 1888, s. 53.

[17] N. S. W. 1900, s. 105, and corresponding sections in Aust. Torr. Syst. 788; V. 1915, s. 178.

[18] N. S. W. 1900, s. 135; Q. 1861, s. 126; S. A. 1886, ss. 71, 207; Tas. 1862, s. 126; V. 1915, s. 247; W. A. 1893, s. 202; P. 1913, s. 147; N. Z. 1915, s. 198; B. C. 1911, s. 124; Al. 1906, s. 106; Can. 1906, s. 144; Tr. 1902, s. 135; J. 1888, s. 137.

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chaser is protected, and the register made conclusive in his favour, even where a misdescription of parcels has occurred; in general these enactments appear to override, in favour of purchasers, all other enactments by which the register is made inconclusive as against certain unregistered interests.[19]

In some jurisdictions the register is made conclusive so long as the entries are "uncancelled,"[20] but although referred to as important in one case,[21] this enactment seems to be implied in all the statutes.

The statutes for the most part purport to make the register conclusive only as to the title of the owner of the land, and the warranty of title accorded to such interests as leases and mortgages arises by implication.[22] Only in Ontario, British Columbia, and Leeward Islands[23] is reference made to the register being conclusive with respect to a charge as well as the land itself, and in British Columbia the register is merely "primâ facie" evidence of the registered title to the charge; in other jurisdictions—for instance, England[24] — the warranty of title given to a mortgage has been treated as inferior to that given to the ownership of the land itself.

The register cannot be conclusive, or indeed of any effect at all, unless it is an actual person—and not a mere fictitious name—who is entered upon it as owner of the land.[25]

The distinction between a fully warranted (or unqualified), qualified, and possessory title is referred to *ante,* p. 51. To the extent that the registered title is not warranted, the register is of course not conclusive. In British Columbia and Leeward Islands,[26] unless a title be fully warranted or "indefeasible" an owner registered in succession to another gets no better title than his predecessor had, and the register is therefore in such cases not conclusive as to any part of the successor's title. In the other two jurisdictions—England and Ontario[27] the title is (though registered as "pos-

[19] See *Crisp* v. *Snowsill* [1917] N. Z. R. 252; also *Billiet* v. *Commercial Bank* [1906] S. A. R. 193, 206, though the enactment there referred to was S. A. 1886, s. 71, which is not in other statutes.

[20] B. C. 1911, s. 22; M. 1913, s. 79; Sas. 1917, s. 174; Al. 1906, s 44; Can. 1906, s. 174; Tr. 1902, s. 131. The Saskatchewan and Canada sections may possibly, owing to a difference in drafting, have a restricted interpretation.

[21] *Williams* v. *Box* (1910) 44 Can. S. C. R. 1, 12, 24.

[22] *Gibbs* v. *Messer* [1891] A. C. 248, 254; *Campbell* v. *Auckland Dist. Land Registror* (1910) 29 N. Z. R. 332; *In re Goldstone's Mortgage* [1916] N. Z. R. 19, 489 (where reference is made to Aust. Torr. Syst. 760); *post,* Chap. VI. "Mortgages," &c.

[23] On. 1914, s. 30 (4); B. C. 1911, s. 34; L. Is. 1886 (1914), s. 8.

[24] See *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47.

[25] *Gibbs* v. *Messer* [1891] A. C. 248.

[26] B. C. 1911, ss. 23, 106; L. Is. 1886 (1914), s. 127.

[27] Eng. 1875, ss. 8, 32; On. 1914, ss. 12, 44. And see Own. & Inc. 95, 168.

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sessory") warranted as from date of initial registration, and the register is to that extent conclusive in favour of the owner and his successors in title. In British Honduras no registered title is at first fully warranted against adverse claims,[28] and the register is therefore not conclusive until the lapse of the statutory periods.

One difficulty in the way of framing a satisfactory list of rights and interests that are not affected by the "conclusiveness" of the register is that some rights and interests which do undoubtedly remain in existence after initial registration are by some of the statutes preserved expressly. The argument that these rights and interests are impliedly abrogated by others of the statutes that do not mention them is however of little weight. It is, for instance, hardly open to doubt—in view of the existing case law [29]—that registered land is usually liable in all jurisdictions (just as unregistered land is) to such public burdens as rates and taxes, expropriation for public purposes, and public rights of user. Nevertheless, in many jurisdictions some or all of these three public burdens are expressly provided for and excepted from the effect of registration.

An instance of the difficulty of construing the registration statutes, when it is necessary to determine whether some statutory enactment or rule of law relating to private rights (as distinguished from public burdens) has been abrogated or not, is to be found in the preceding chapter (Chap. III) on the subject of adverse possession. It is there pointed out that in some of the statutes limitation Acts are expressly referred to, in others not at all. In the nine jurisdictions — the seven Australian, Jamaica, and (in a modified form) Alberta [30]—the statutes contain a section purporting to abrogate or repeal all statutes and rules of law that are "inconsistent" with the registration statute; this enactment—described as a "rhetorical flourish" [31]—is not of any real service in helping the judiciary to decide what statutes and rules of law are so far "inconsistent" as to have no application to registered land, and its absence from the majority of the statutes appears to be of no importance.

[28] B. H. 1914, ss. 14-16, 30.

[29] *Knight* v. *Rockdale Munic. District* (1899) 20 N. S. W. Eq. 32; *Gladstone Municipality* v. *O'Neill* (1894) 6 Q. L. J. 206; *Re McMillan* (1905) 5 S. R. (N. S. W.) 350; *Vickery* v. *Strathfield Municipality* (1911) 11 S. R. (N. S. W.) 354.

[30] N. S. W. 1900 s. 2 (4); Q. 1861, s. 1; S. A. 1886, s. 6; Tas. 1862, s. 1; V. 1915, s. 3; W. A. 1893, s. 3; P. 1913, s. 4 (4); J. 1888, s. 1; Al. 1906, s. 154.

[31] *Buckett* v. *Knobbe* (1874) 8 S. A. R. 86, 93. The enactment is also referred to in *Featherstane* v. *Hanlon* (1886) Badg. Dig. 4, and *Barry* v. *Heider* (1914) 19 C. L. R. 197, 204.

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The exception of the public burdens above mentioned, and private rights under limitation Acts, from the effect of registration, are illustrations of a general principle that must be relied on as a guide, whenever it is necessary to determine in any particular instance how far the register really is "conclusive" as to the rights of other persons than the registered owner. It is not difficult to state the principle in general terms, but it is extremely difficult to state its limits accurately. The general principle is that registration of title is not intended to change the substantive law of property, or interfere with rights under that law, except so far as is necessary for the carrying out of its professed objects—facility in dealing with land and security of title to land.[32] The difficulty always is to determine what degrees of change and interference are so far necessary for the practical working of the statutory scheme as to be covered by the language of the enactments, when interpreted in the light of the above principle.

That the changes effected are (both in number and kind) much more procedural than substantive is shewn, apart from actual decisions, by the considerable number of cases in which points in the law of vendor and purchaser come before the courts, where the land is registered but nothing turns on the mere registration. This may be further exemplified by observing that the propositions laid down in such a text-book as Theobald's Law of Land (which deals entirely with substantive law and not procedure) will be found as a rule to apply to registered as well as unregistered land. So, though aliens are not mentioned in the registration statutes, registered as well as other land is subject to the general law and any special regulations by which transactions with aliens are restricted.[33] This may be said with regard to moneylenders and the legislation concerned with them,[34] and the legislation governing rates of interest.[35]

In the present chapter the principle above stated will be found to underlie all the cases on the subject, and in the absence of

[32] This principle is referred to in numerous cases: See *Limoges* v. *Campbell* (1895) 2 Terr. R. 356; *Vickery* v. *Strathfield Municipality* (1911) 11 S. R. (N. S. W.) 354, 363; *Beatty* v. *Bailey* (1912) 26 O. L. R. 145; *Smith* v. *Ernst* (1912) 22 Man. R. 363; *Barry* v. *Heider* (1914) 19 C. L. R. 197. A comparison of *Barry* v. *Heider* with *West* v. *Read* (1913, 13 S. R. (N. S. W.) 575) brings out clearly the general nature and limits of the changes effected by registration of title. And see Aust. Torr. Syst. 80 *et seq.*; Can. Torr. Syst. 137 *et seq.*

[33] *In re White* (1915) 15 S. R. (N. S. W.) 217. And see Aust. Torr. Syst. 734.

[34] *Bull* v. *Simpson* (1915) 15 S. R. (N. S. W.) 365.

[35] *Canadian Mortgage Invest. Co.* v. *Cameron* (1917) 55 Can. S. C. R. 409.

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authority will be relied on as the best guide in determining the limits of the conclusiveness of the register under various circumstances, according to the nature of the claim that may be set up against the title of the registered owner.

Occasionally a right conferred by another statute has been held to be superior to that conferred by registration, and the register accordingly to that extent is not conclusive. This has happened in Australia with respect to land sold in default of payment of rates, &c., and in Canada with respect to land exempt from seizure for debt.[36] On the other hand statutes enacted subsequently to the registration statute are sometimes construed as conferring rights that are only to be exercised subject to the provisions of the registration statute.[37] Such cases are likely to be even less frequent in the future; the tendency is for new statutes to be more explicit on this point, by making definite reference to the registration statutes and either including or excluding registered land.[38]

Among private rights of property, as to which the register is conclusive in some jurisdictions and not conclusive in others, the most important are easements. In British Honduras the statute does not mention easements. In British Columbia and Federated Malay States there are only slight references to easements.[39] The references in the Trinidad-Tobago, Jamaica, and Leeward Islands statutes are also few.[40] In the remaining jurisdictions there is great variety in the enactments,[41] the register being in some conclusive only as to easements created after initial registration. In those jurisdictions, as for instance British Columbia, where no special provision is made on the subject, the presumption appears to be that an easement is, so far as the servient tenement (when registered land) is concerned, on the footing of any other interest or

[36] See Aust. Torr. Syst. 83; Can. Torr. Syst. 261; *North-West Thresher Co.* v. *Fredericks* (1911) 44 Can. S. C. R. 318.

[37] *Johansson* v. *Cronquist* [1917] 3 W. W. R. 1029 (Al.).

[38] Illustrations are: Voluntary Conveyances statutes in several jurisdictions (see Aust. Torr. Syst. 835, and *post*, Sect. 4); (Victoria) Conveyancing Act 1915 (No. 2633), ss. 3, 14; (New Zealand) Property Law Act 1908 (No. 152), s. 1; Aust. Torr. Syst. 252, 255, 598, 605; (Saskatchewan) Assignments Act (R. S. 1909, c. 142), s. 7.

[39] B. C. 1911, s. 20A; F. M. S. 1911, s. 29.

[40] Tr. 1902, ss. 47, 51; J. 1888, s. 68; L. Is. 1886 (1914), ss. 11, 25.

[41] See Own. & Inc. 136, 138; Aust. Torr. Syst. 816; Can. Torr. Syst. 49-57; Hutch. 80. Later cases are: *Billiet* v. *Commercial Bank* [1906] S. A. R. 193; *Barber* v. *Petone (Mayor)* (1908) 28 N. Z. R. 609; *Mackechnie* v. *Bell* (1909) 28 N. Z. R. 348; *Crisp* v. *Snowsill* [1917] N. Z. R. 252; *Rex* v. *Registrar of Titles* [1918] V. L. R. 228; *Asarero* v. *Monroe* (1916) 2 Tr. & Tob. 475. Enactments not included in the above references are: I. 1891, ss. 45, 47; V. 1915, ss. 68-70, 72, 73, 105-109, 128, 271; P. 1913, ss. 29, 59-62, 71, 72; N. Z. 1915, ss. 58, 60, 64, 82, 197; Fi. 1876 (1906), ss. 41, 42; On. 1914, ss. 13, 24.

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charge, and requires protection by restrictive entry if it is not to be lost to its owner by the conclusiveness of the register.[42]

In a few instances the conclusiveness of the register extends to the shutting out of equitable rights or interests which under the general law could be protected through the medium of notice, by endorsement on the title deeds or otherwise. And this inability to obtain protection may even extend to strictly legal rights, which are shut out both from registration and from notification on the register.

An instance of the first kind is the right to enforce some personal covenant against the successive owners of land.[43] An instance of the second kind is a lis pendens, which in some jurisdictions cannot be protected by any entry on the register,[44] though in others the rights conferred by it are turned into equitable rights operating through the medium of notice and capable of protection by some restrictive entry on the register, but liable to be lost or postponed to a purchaser without notice.[45] Lis pendens is not mentioned by the majority of the statutes, and in those jurisdictions the Canadian cases just cited will perhaps apply. In South Australia, Victoria, and Western Australia,[46] express enactments forbid a lis pendens (in South Australia) to be registered, and (in the other two jurisdictions) to affect registered land. In Ireland, Manitoba, and British Columbia,[47] a lis pendens may be registered, and in Ontario and Trinidad-Tobago [48] may be the subject of a caution or a caveat. The English statutes are silent as to lis pendens, but a caution is suggested as a proper protection.[49]

A vendor's lien for unpaid purchase money could be protected by caveat or other similar entry, or by mere deposit of the certificate of title by way of equitable mortgage;[50] if not so protected it would be lost. Only in Ireland is provision made for registering such a

[42] The New Zealand case of *Crisp* v. *Snowsill* (*supra*) seems relevant.

[43] See Aust. Torr. Syst. 800-803; *Staples & Co.* v. *Corby* (1900) 19 N. Z. R. 517; Can. Torr. Syst. 240-245. The law as to the right to caveat laid down in *Staples & Co.* v. *Corby* cannot be regarded as settled.

[44] See *Syndicat Lyonnais* v. *McGrade* (1905) 36 Can. S. C. R. 251, and comments in Can. Torr. Syst. 158, 188, 383.

[45] *Brooksbank* v. *Burn* (1910) 15 West R. 661 (Al.), under Al. 1906, s. 97, which gives unusual efficacy to a caveat.

[46] S. A. 1886, s. 250; V. 1915, s. 274; W. A. 1893, s. 233.

[47] I. 1891, s. 45, and 1910 O. 4, r. 17; M. 1913, ss. 50, 78, 124; B. C. 1911, ss. 71, 104, 137, 158-162; illustrations being *Bevilockway* v. *Schneider* (1893) 3 B. C. R. 90, and *Granby Consol. Mining Co.* v. *Esquimault Ry.* [1919] 3 W. W. R. 331 (Privy Council). As to latter case, see p. 183 *post*.

[48] On. 1914, s. 82; Tr. 1902, s. 92.

[49] Br. & Sh. 27, 199.

[50] *Denny* v. *Nozick* [1919] 3 W. W. R. 366 (Al.); *Alexander* v. *Simpson* (1903) Jamaica, unreported.

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lien as a charge.[51] In Queensland and Papua [52] the vendor's lien is expressly abrogated, but this would not prevent a caveat being entered or an equitable mortgage being created by deposit of the certificate of title; the lien is not referred to in any other of the statutes.

In the Canadian jurisdictions the registration of liens under Mechanics' Lien Acts is provided for by general legislation. In Ontario, British Columbia, and Manitoba,[53] land may be subject to such a lien without the lien being made an incumbrance upon it on the face of the register. Express registration appears to be necessary in Saskatchewan, Alberta, and North-West Territories.[54] But unless there is a valid lien in existence, the mere entry on the register will not make it an incumbrance on the land.[55]

SECTION 2—RIGHTS OF THE CROWN.

Whether the registered title of an owner of land is conclusive against the Crown, in the absence of express enactment, cannot be said to be settled; it was treated as an open question by the Privy Council in 1904.[1] But "the Crown has always been assumed, when once land is under the Act, to be bound by the Act," [2] and the better opinion seems to be that the register is conclusive against the Crown as regards the ordinary rights of property enjoyed by subjects. In thirteen jurisdictions at least (*ante,* pp. 28, 29) reference is made by the statutes to the registration of the Crown as owner.

In only one jurisdiction—British Honduras [3]—is a general saving of all rights of the Crown enacted; the statute does not "extend to any estate, interest, power, right, franchise, jurisdiction or royalty of his Majesty his heirs or successors." Such a sweeping enactment can hardly be implied in other statutes.

In twelve jurisdictions—British Columbia, Manitoba, Saskatchewan, Alberta, North-West Territories, Tasmania, Victoria, Western Australia, Papua, British Honduras, Trinidad-Tobago,

[51] I. 1891, s. 45.

[52] Q. 1861, s. 97; P. 1913, s. 128. See Power's R. P. Acts, 129.

[53] On. 1914, ss. 66 (4), 67; B. C. 1911, s. 22 (1) (*g*); M. 1913, s. 78 (*e*).

[54] Can. Torr. Syst. 141.

[55] *Calgary (City)* v. *Dominion Radiator Co.* (1917) 56 Can. S. C. R. 141.

[1] *Att.-Gen.* v. *Dickson* [1904] A. C. 273, 280.

[2] *In re Bourke* (1897) 7 Q. L. J. 133, 135. Other cases containing dicta on this point are cited in Aust. Torr. Syst. 822. And see *Public Trustee* v. *Registrar-General* (1899) 17 N. Z. R. 577; *Rex* v. *Price* (1904) 24 N. Z. R. 291; *Commonwealth* v. *State of New South Wales* (1918) 25 C. L. R. 325, 340.

[3] B. H. 1914, s. 45.

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Jamaica [4]—reservations contained in the original grant from the Crown are excepted from the effect of registration. In jurisdictions where there is no similar enactment the view generally taken is that such reservations would not continue to have effect against the owner unless entered in some way on the register; these are therefore usually entered as incumbrances when initial registration takes place.

In nine jurisdictions—England, Ireland, Ontario, British Columbia, Manitoba, Saskatchewan, Alberta, North-West Territories, South Australia [5]—the enactments making the register conclusive expressly include the Crown as one of the persons whose rights are shut out by the registration. In these jurisdictions the registered title is thus in terms made conclusive against the Crown. But in several of these same jurisdictions special rights of the Crown are expressly saved, as in England and Ireland rights to escheat or forfeiture,[6] in Ontario statutory rights conferred on the Crown,[7] in British Columbia reservations in the original grant.[8] In New Zealand statutory rights of the Crown to take roads are preserved.[9] On the other hand, in British Columbia Crown debts do not affect the land of the debtor unless these are registered.[10]

It will thus be seen that even where the registered title is expressly made conclusive against the Crown, this conclusiveness is often cut down and made of less extent than against the rights of subjects. Where express provision is thus made both for and against the rights of the Crown, it may be difficult as a matter of construction to determine how special rights of the Crown—such as royal mines—not expressly mentioned are to be treated. Where the Crown's rights are not expressly provided for, it seems clear that royal mines remain vested in the Crown notwithstanding the land is registered; in a Queensland case no attempt was made to draw any distinction between registered and unregistered land with respect to mines of gold.[11] That such prerogative rights should remain unaffected by registration of the land is quite consistent with

[4] B. C. 1911, s. 22; M. 1913, s. 78; Sas. 1917, s. 60; Al. 1906, s. 43; Can. 1906, s. 73; Tas. 1862, s. 40, and 1893, s. 9; V. 1915, s. 72; W. A. 1893, s. 68; P. 1913, sch. 1; B. H. 1914, s. 30; Tr. 1902, s. 48; J. 1888, s. 55.

[5] Eng. 1875, ss. 7, 13, 30, 35; I. 1891, ss. 30, 36; On. 1914, ss. 10, 18, 42, 49; B. C. 1911, s. 22; M. 1913, s. 79; Sas. 1917, s. 174; Al. 1906, s. 44; Can. 1906, s. 174; S. A. 1886, s. 70.

[6] Eng. 1875, s. 105; I. 1891, s. 96.

[7] On. 1914, s. 24 (1) (*g*).

[8] B. C. 1911, s. 22.

[9] N. Z. 1915, sch. 2 f. B.

[10] B. C. 1911, s. 60. As to New South Wales, &c., see Conv. & Prop. L. 170, 171.

[11] *Plant* v. *Rollston* (1894) 6 Q. L. J. 98.

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ordinary rights of property, when these are vested in the Crown, being bound by the provisions of the statutes in the same way as subjects' rights of property, and this seems the reasonable construction to place on the statutes in the absence of express provisions on the point.

Registration appears to have no effect on the prerogative rights of the Crown in Canada. Where provincial legislation as to escheated land was held ultra vires, no question was raised by reason of the land being on the register.[12] "The Crown" in a provincial statute means only the Crown in right of the province whose legislature enacts the statute,[13] and the same principle applies in all jurisdictions.

SECTION 3—PUBLIC BURDENS.

Reference has already been made to the fact that the registered title is not conclusive against the existence of such public burdens in rates and taxes, rights of expropriation, and public rights of user (*ante*, p. 99). The general principles applicable in the Australian jurisdictions apply throughout.[1] It will be sufficient here to particularize the enactments in which these matters, or some of them, are expressly referred to by the registration statutes, and to mention those jurisdictions which contain no such enactments. The latter number six: New South Wales, Queensland, Papua, Fiji, British Honduras, Federated Malay States. The jurisdictions in which enactments are found number sixteen: England, Ireland, the six Canadian jurisdictions, five of the Australasian, Trinidad-Tobago, Jamaica, Leeward Islands.[2]

Apparently, in most cases where any of these public burdens are expressly or impliedly not affected by the land being registered, there is no distinction between their creation before or after initial registration. However, in Jamaica,[3] a distinction is impliedly drawn with respect to "unpaid rates and assessments, quit-rents, or taxes"; only those "that have accrued due since the land was brought under the operation of" the registration statutes being expressly excepted from the effect of registration; this seems to

[12] *Trusts and Guarantee Co.* v. *Rex* (1916) 54 Can. S. C. R. 107.

[13] *Gauthier* v. *Rex* (1917) 56 Can. S. C. R. 176. See On. 1914, ss. 10, 18, 42, 49.

[1] See Aust. Torr. Syst. 80-86, 818-820; *Fabian* v. *Greytown North* (*Borough*) (1891) 10 N. Z. R. 505.

[2] Eng. 1875, s. 18; I. 1891, s. 47; On. 1914, s. 24; B. C. 1911, s. 22; M. 1913, s. 78; Sas. 1917, s. 60; Al. 1906, s. 43; Can. 1906, s. 73; S. A. 1886, ss. 69, 71, 86; Tas. 1862, s. 40; V. 1915, s. 72; W. A. 1893, s. 68; N. Z. 1915, s. 70; Tr. 1902, s. 48; J. 1888, s. 55; L. Is. 1886 (1914), ss. 11, 35.

[3] J. 1888, ss. 17, 55.

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mean that as against rates and taxes accrued due and unpaid at the time of initial registration, the registered title is conclusive and these cannot be charged on the land unless by actual entry on the register.

SECTION 4—VOLUNTARY TRANSACTIONS.

In some jurisdictions the registration statutes themselves draw a clear distinction between purchasers for value and persons who become registered as owners otherwise than in consequence of a transaction for value, and proceed to except the volunteer from the conclusive effect of the register (*ante,* p. 97). In the majority of the jurisdictions this is not done, or is done in special cases only, the question of the conclusiveness of the register where volunteers are concerned being left to be dealt with for the most part by case law. Even in the statutes that draw the distinction most clearly between voluntary transactions and transactions for value, the ground is not completely covered by the enactments, so that the law must be settled largely by judicial decision in all jurisdictions.

There are three heads under which voluntary transactions may fall in connexion with the conclusiveness of the register: (1) Where registration is effected by way of assurance in favour of a person who gives no value; (2) Where the voluntary transaction is an initial registration, and the land is placed on the register by an owner who (though originally a purchaser for value) holds by a defective title; (3) Where a transaction would be invalid against creditors or purchasers as not made for value, if it had been made with respect to unregistered land.

1. In every jurisdiction the statutes contain some reference (express or implied) to the distinction between voluntary transactions and transactions for value. The plainest and most general statement is made in England, Ireland, and Ontario,[1] where it is enacted that a transfer of registered land "made without valuable consideration" is, so far as the transferee is concerned, subject to all unregistered rights subject to which the transferor held the land; also, a "purchaser for valuable consideration" is not affected by omission to send any requisite notices. In Fiji and Federated Malay States[2] it is only a "purchaser" who is protected by registration, and the language of the enactment implies that volunteers

[1] Eng. 1875. ss. 33, 38, 92; I. 1891, ss. 36, 82; On. 1914, ss. 45, 52, 113. Some Ontario cases are: *Farah* v. *Glen Lake Mining Co.* (1908) 17 O. L. R. 1; *Re Lord and Ellis* (1914) 30 O. L. R. 582; *John Macdonald & Co.* v. *Tew* (1914) 32 O. L. R. 262. And see Aust. Torr. Syst. 835; Own. & Inc. 229; Can. Torr. Syst. 155-163.

[2] Fi. 1876 (1906), s. 14; F. M. S. 1911, s. 8.

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are not protected.[3] In the Canadian jurisdictions [4] other than Ontario, the Australasian jurisdictions,[5] and the five Crown colonies,[6] the distinction between volunteers and purchasers is chiefly referred to in the provisions relating to the conclusiveness of the register when a mistake has been made or there are competing assurances. In Queensland and Papua [7] the enactment protecting transferees against unregistered interests of which the transferees may have notice applies to "a transferee whether voluntary or not," and in Trinidad-Tobago "transfer" is defined as including "transfer without valuable consideration." [8]

In effect, the inferior position of a voluntary transferee for all purposes—established by statutory enactment in England, Ireland, Ontario, Fiji, and Federated Malay States—is established by judicial decision in several of the Australasian jurisdictions;[9] the rule thus laid down appears to apply in all these, including Queensland and Papua. The same view has been taken in some of the Canadian cases,[10] but these same Canadian courts have since doubted its correctness, and are inclined to hold that volunteers are entitled to the same protection on the register as purchasers.[11] This change of opinion is based upon a passage in a judgment of the Privy Council,[12] which however does not appear to bear the wide meaning thus placed on it.

[3] *Chang Lin* v. *Chong Swee Sang* (1908) Innes F. M. S. 95.

[4] B. C. 1911, ss. 25A. 104 (2), 121A, 124; M. 1913, s. 84; Sas. 1917, ss. 159, 160, 208; Al. 1906, ss. 45, 104-106; Can. 1906, ss. 142-144, 193.

[5] N. S. W. 1900, ss. 124, 126 (4), 135; Q. 1861, ss. 109, 123, 126, and 1877, s. 51; S. A. 1886, ss. 69, 71, 204, 207, 249; Tas. 1862, ss. 124-126; V. 1915, ss. 72, 244, 246, 247; W. A. 1893, ss. 68, 199, 201, 202; P. 1913, ss. 39, 87, 144, 147; N. Z. 1915, ss. 59, 198; Fi. 1876 (1906), ss. 14, 91.

[6] B. H. 1914, ss. 15, 16, sch. D r. 12; Tr. 1902, ss. 47, 134, 135; J. 1888, ss. 135-137; L. Is. 1886 (1914), s. 19; F. M. S. 1911, ss. 8, 68.

[7] Q. 1861, s. 109; P. 1913, s. 30. This enactment is referred to in Aust. Torr. Syst. 833. See also Power's Real Prop. Acts, 144. A probable solution of the difficulty caused by the enactment is that it was intended to effect the same result as the (English) Voluntary Conveyances Act 1893; the express reference to the 13 Eliz. and the omission of any reference to the 27 Eliz. seem to support this suggestion.

[8] Tr. 1902, s. 2.

[9] *Chomley* v. *Firebrace* (1879) 5 V. L. R. 57; *Crow* v. *Campbell* (1884) 10 V. L. R. 186, 194; *Gibbs* v. *Messer* [1891] A. C. 248, 254; *Biggs* v. *McEllister* (1880) 14 S. A. R. 86. See also Aust. Torr. Syst. 832, 839.

[10] *Turner* v. *Clark* (1909) 10 West. R. 25; *Fish* v. *Bryce* ib. 616 (stated in Can. Torr. Syst. 154-157), and perhaps *Shetler* v. *Foshay* (1915) 31 West. R. 181—all in Saskatchewan.

[11] *Coventry* v. *Annable* (1911) 19 West. R. 400, 414 (Sas.—stated in Can. Torr. Syst. 156) affd. (on ground of fraud only): *Annable* v. *Coventry* (1912) 46 Can. S. C. R. 573.

[12] *Assets Co.* v. *Mere Roihi* [1905] A. C. 176. The passage is at the foot of p. 191, "This provision" down to the end of the paragraph over page — "from the wrong-doer."

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That the registered title is not so conclusive in favour of volunteers as of purchasers seems clear on other grounds. The case of the volunteer is really covered by the doctrine of resulting trusts, and it has been laid down in many jurisdictions that this doctrine, "arising from the fact that no consideration was paid," applies to registered land and its owners on the register.[13] It is of course possible that the doctrine may not apply to its full extent in jurisdictions where English equity law has only been introduced by statutory enactment, and a suggestion to this effect has been made in the Federated Malay States.[14]

In four of the Australasian jurisdictions—Queensland, South Australia, Papua, Fiji [15]—the jurisdiction of the courts in respect of all equitable interests is expressly preserved by the statutes themselves. In three of the Canadian jurisdictions—Saskatchewan, Alberta, North-West Territories [16]—contracts for dispositions of land are similarly protected. Corresponding enactments in Ireland mention "actual fraud or mistake," and in Federated Malay States "actual fraud," only.[17] These enactments do not seem to do more than has been done by judicial decision in other jurisdictions towards protecting unregistered interests.

The cases so far cited have been those in which the resulting trust was enforced against a person who had got on the register by transfer from an owner already registered. The same principle applies, though the case is rarer, where the constructive trustee is the original applicant for initial registration, or the first registered owner.[18] In the cases cited the registered owner had, before getting on the register, acquired the land as agent for and with the money of the rightful owner, who was accordingly held entitled to have the land transferred to himself. This is in fact the very illustra-

[13] *Chomley* v. *Firebrace* (1879) 5 V. L. R. 59, 74; *McKie* v. *McKie* (1898) 23 V. L. R. 489; *Payne* v. *McDonald* (1908) 6 C. L. R. 208; *Fonseca* v. *Jones* (1910) 14 West. R. 148, 156 (Man.); *Chang Lin* v. *Chong Swee Sang* (1908) Innes F. M. S. 95. And see Aust. Torr. Syst. 832, 839.

[14] See *Chan Gun Lai* v. *Pole* (1911) Innes F. M. S. 126, and *ib.* at p. 45. The Privy Council's judgment in *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491, especially at pp. 504-506, seems to be adverse to this view, but English equitable doctrines were held to have been carried too far in *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A. C. 209.

[15] Q. 1877, s. 51; S. A. 1886, s. 249; P. 1913, s. 87; Fi. 1876 (1906), s. 117.

[16] Sas. 1917, s. 205; Al. 1906, s. 139; Can. 1906, s. 4.

[17] I. 1891, s. 34 (1); F. M. S. 1911, s. 88.

[18] *Raleigh* v. *Glover* (1866) 3 W. W. & a'B. 163; *Raleigh* v. *McGrath* (1877) 3 V. L. R. 250.

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tion put in the Privy Council's judgment as to the court's power of rectifying the register.[19]

2. A first registered owner whose initial application is founded upon a defective title is for practical purposes treated as a volunteer in contradistinction to a purchaser for value, and his registered title is not conclusive for all purposes as that of a purchaser would be. The principle however on which the register is in such cases inconclusive, is that the owner has been registered by mistake. If the mistake is not one which can be made a ground for rectifying the register and restoring the land itself to the rightful owner, then the registered owner may be liable for the value of the land. This liability may be incurred either directly to the rightful owner, or indirectly to the State authority after indemnity has been paid to the rightful owner. This right of recovering compensation or indemnity is in most jurisdictions limited to a period of six years from the time of the rightful owner's loss of his land.

The circumstances under which initial registration is inconclusive by reason of a fundamentally defective title are referred to in Sect. 9, *post*—"Mistake." The distinction between the land itself or only its value being recovered, is dealt with in Sect. 12, *post* "Liability to rightful owners," &c.

The principle, that an initial registration is sometimes inferior in point of conclusiveness to a subsequent registration or a transaction for value, has been obscured by the circumstance that in several cases the rightful owner has been entitled to recover compensation only and not the land itself, and has (by allowing the statutory time limit to elapse) been barred of his remedy.[20]

Moreover, an initial registration on a bad title may, from one point of view, occupy a stronger position than a subsequent registration for value effected on the strength of a void or ineffective instrument.[21]

In all the jurisdictions in which English law is the basis of the local jurisprudence—that is, in all twenty-two except Federated Malay States—it is believed that voluntary assurances are, in favour of creditors or purchasers, liable to be set aside, either under the principles of bankruptcy law or of the statutes of 13 and 27 Elizabeth. So far as purchasers are concerned, the application of the 27 Eliz. is restricted in many jurisdictions by the provisions of Voluntary Conveyances Acts such as the English Act of 1893. But what-

[19] *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491, 504.

[20] See *Bonnin* v. *Andrews* (1878) 12 S. A. R. 153; *Hamilton* v. *Iredale* (1903) 3 S. R. (N. S. W.) 535; *Assets Co.* v. *Mere Roihi* [1905] A. C. 176.

[21] See *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47, 73, 76, 77.

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ever may be the extent in any particular jurisdiction to which voluntary assurances are, with respect to ordinary unregistered land, invalid as against creditors and purchasers, these appear to be invalid to precisely the same extent with respect to registered land.[22] The substantive law is the same, whether the land be registered or unregistered, but the method of adjusting the rights and liabilities of the parties to any such transaction has been altered by the system of registration of title. If the volunteer has been registered as owner it is necessary that the register should be rectified, either by a formal transfer from the registered owner or by an alteration of the register being made under the direct authority of the court. As in the case of other voluntary transactions on the register, this right to rectification can be referred to the principle of resulting trusts (*ante*, p. 108). But it has been said that the creditors' right under the 13 Eliz. is a "statutory right," and "neither an unregistered title, nor an unregistered interest, nor an unregistered disposition."[23] So if under bankruptcy law or the statutes 13 and 27 Eliz. a conveyance to trustees by way of settlement is voidable, this inferiority in the title of the trustees and beneficiaries is not cured by the trustees becoming registered owners under an initial application; the trustee in bankruptcy, creditors, or purchaser can still avoid the settlement, and have either the land transferred to the claimant or the trustees declared trustees for him in place of the beneficiaries.[24]

The voluntary transferee can however confer a good title on a purchaser, who on being registered as owner will be as secure as any other registered owner. This is expressly provided for in the statutes of England, Ireland, and Ontario,[25] and a similar provision seems to be implied in other jurisdictions. The aid of the Voluntary Conveyances Act 1893 (in England and Ireland), and similar statutes in other jurisdictions,[26] seems unnecessary for the purpose

[22] Some Australasian cases are given in Aust. Torr. Syst. 835, 839. Other cases are: *In re Wildash* (1877) Q. L. R. pt. II. 47 (bankruptcy law); *In re Hourigan* [1904] S. R. Q. 117 (13 Eliz.); *Thompson* v. *Boyd* (1888) 14 V. L. R. 594 (27 Eliz). Canadian cases under 13 Eliz. are: *Merchants' Bank* v. *McKenzie* (1900) 13 Man. R. 19; *Syndicat Lyonnais* v. *McGrade* (1905) 36 Can. S. C. R. 251; *Bevilockway* v. *Schneider* (1893) 3 B. C. R. 90; *Peck* v. *Sun Life Ass. Co.* (1905) 1 West. R. 302 (B. C.).

[23] *Peck* v. *Sun Life Ass. Co.*, *supra*.

[24] *Administrator-General* v. *Clough* (1916) Jamaica, unreported. Since this decision a Voluntary Conveyances statute has been enacted in Jamaica.

[25] Eng. 1875, s. 33; I. 1891, s. 36; On. 1914, ss. 45, 52. Own. & Inc. 229.

[26] Some of these jurisdictions are: New South Wales—Conv. and Law of Prop. Act 1898 (No. 17), s. 29; Victoria—Real Prop. Act 1915

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of giving a purchaser from the volunteer a good title, however useful these statutes may be in rebutting the statutory presumption of fraud which might otherwise arise.

SECTION 5—UNREGISTERED TRANSACTIONS.

That a registered owner of land held under a system of registration of title is entitled to set at naught any contract into which he may have entered with respect to his land, is a proposition which does not require refutation. There appears also to be now no danger in any of the twenty-two jurisdictions that, as at one time seemed possible, a contract for the sale and purchase of land, or an instrument in statutory form but unregistered, will be held to be "inoperative to create any right with respect to the land itself."[1]

Registration of title, as dealt with in this book, has definitely reached the point at which a registered owner is not prevented from creating by his own contract or conduct "estates or interests in the land, which are valid and enforceable as against him, even though unregistered"; and similarly he is not protected "against the obligations which he may choose to incur under his own contracts."[2]

The registered owner may of course not be bound by his own unregistered assurance, if he can only be bound by creating some legal (as distinguished from equitable) interest in land, and the unregistered assurance passes no legal interest.[3] Nor would the

(No. 2719), ss. 173-175; Tasmania—Voluntary Conveyances Act 1896 (No. 16); New Zealand—Property Law Act 1908 (No. 152), s. 123; Trinidad-Tobago—Voluntary Conveyances Ordinance 1915 (No. 38); Jamaica—Voluntary Conveyances Law 1916 (No. 28). In all these statutes registered land is referred to. In British Columbia a similar enactment is contained in the registration statute itself (B. C. 1911, ss. 141, 142), but this is probably due to the fact that unregistered, as well as registered, land is dealt with in the registration statute.

[1] See *Barry* v. *Heider* (1914), 19 C. L. R. 197, 205, referring to *Lange* v. *Ruwoldt* (1872) 6 S. A. R. 75, 7 S. A. R. 1—the "decision in South Australia soon afterwards overruled" by *Cuthbertson* v. *Swan* (1877) 11 S. A. R. 102.

[2] *Josephson* v. *Mason* (1912) 12 S. R. (N. S. W.) 249, 259, 266; *Reeves* v. *Konschur* (1909) 10 West. R. 680, 693 (Sas.). The cases on mortgages are to the same effect: *Mathieson* v. *Mercantile Finance Co.* (1891) 17 V. L. R. 271; *Seabrook* v. *McMullan* (1908) 10 W. A. R. 47. This principle is expressly adopted in some of the statutes: M. 1913, s. 91; Sas. 1917, s. 58; Al. 1906, s. 46; Can. 1906, s. 70. These are referred to *post*.

[3] See *Naumberg* v. *Albertson* (1888) 3 Q. L. J. 125; *Tattley* v. *Cooper* (1905) 25 N. Z. R. 18; *Seabrook* v. *McMullan, supra*; *Martin* v. *Coultas* [1911] S. A. R. 1; *Macindoe* v. *Wehrle* (1913) 13 S. R. (N. S. W.) 500; *Davis* v. *McConochie* (1915) 15 S. R. (N. S. W.) 510. In England and Ontario the position of a lessee is somewhat different, and questions of the old technical "legal estate" might make the above cases inapplicable.

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registered owner be bound by an assurance that was by statute prohibited and made void.[4] In such cases the register may be said to continue to be conclusive in favour of the registered owner. But apart from such cases, with respect to enforceable estates, interests, and contractual obligations above referred to, the register may be said not to be conclusive as between the owner and the persons with whom he has been dealing.

To ask whether these estates, interests, and obligations are enforceable against the registered owner by persons actually contracting or dealing with him and no others, or whether these persons can in turn assign their rights as interests in the land to others, is to raise a question as to the more exact nature of these rights. Shortly, is an unregistered estate, interest, or obligation no estate at all but a mere personal right of action; or is it to be regarded as an equitable estate or interest in the land, with the incidents of an equitable estate or interest in ordinary English law? If these unregistered interests created by the registered owner himself are equitable interests and not mere personal rights of action, it is obvious that they trench more deeply upon the conclusiveness of the register.

No short and perfectly accurate answer can be given to the question asked. The statutes and cases in the different jurisdictions are not uniform. On the whole it may be said that these unregistered interests are either equitable interests or to be treated on the footing of equitable interests. Apart from the actual enactments and cases that define the nature of an unregistered interest of this kind, there are some general considerations that seem to justify the above proposition, and these may be very shortly summarized as follows: References to unregistered interests occur in the statutes of every one of the jurisdictions; the system of caveats or restrictive entries obtains in every jurisdiction; the registration of judgments or executions is, in the majority of jurisdictions, subject to unregistered interests; compensation for loss of land through wrongful registration is payable in respect of equitable interests;[5] equitable mortgages by deposit of certificate of title are valid in the majority of jurisdictions, either by statute or case law; specific performance of

[4] No case under the registration statutes can be cited, the tendency of the courts being to construe such enactments as creating contractual rights only instead of interests in the land: see *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491; *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A. C. 209. 214. An illustration under another statute is *Bickle* v. *Roach* (1915) 15 S. R. (N. S. W.) 295, affd. (on other grounds) as *Roach* v. *Bickle*, 20 C. L. R. 663.

[5] *Williams* v. *Popworth* [1900] A. C. 563, 568; *Barry* v. *Heider* (1914) 19 C. L. R. 197, 214; *Tolley & Co.* v. *Byrne* (1902) 28 V. L. R. 95.

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contracts for sale and purchase is referred to in most of the statutes; priority according to date of registration, not creation of interest, is conferred by most of the statutes.

Land may of course come on to the register already bound by some trust or unregistered interest. Such an interest is enforceable, and may also be defeated, in the same way as if created subsequently to the initial registration. It is only expressly provided in England, Ireland, and Ontario,[6] that the initial registration of an owner who is entitled otherwise than beneficially is subject to the unregistered interests of the beneficiaries, but such a provision is implicit in all the statutes.

The priority of the registered title over unregistered rights or interests created by the registered owner is secured in the statutes by enactments expressly making unregistered interests inferior when in competition with registered interests, and by enactments making unregistered instruments ineffective to pass any interest in the land.[7] Only in British Honduras is there no express enactment as to the effect or consequence of an instrument being unregistered; but "equitable estates and interests" are expressly recognized and provided for among unregistered interests that can be protected by caveat against the "legal estate, interest, power, or right" on the register.[8]

Putting aside British Honduras, there are then twenty-one jurisdictions in which the statutes enact, in one form or another, that unregistered instruments are to be ineffective to pass any estate or interest in the land; in some only of these is the positive effect of an unregistered instrument declared by the statutes, and in the majority this has had to be determined by judicial decision.

In England and Ontario [9] transfers and charges are directed to be "completed" by registration of the person taking the interest, and until a transfer is so completed the transferor is "deemed to remain owner of the land." Charges only cease on registration of discharge. Express authority is given for creation of unregistered

[6] Eng. 1875, s. 7; I. 1891, s. 30; On. 1914, ss. 10, 18.

[7] A third method is to make the unregistered instrument inadmissible in evidence. This is done in British Columbia as to instruments taking effect before 1st July, 1905: B. C. 1911, s. 105. This inadmissibility is a penalty imposed on non-registration, but does not otherwise affect the validity of the instrument: *Howard* v. *Miller* [1915] A. C. 318, 325. There are similar provisions in the Uganda and Sudan statutes (*ante*, p. 17). But this plan belongs rather to systems of deed registration: see *Samy Nathan* v. *Ramasamy* (1904) 8 Str. Sett. R. 117.

[8] B. H. 1914, ss. 30, 40, sch. D.

[9] Eng. 1875, ss. 22, 28, 29, 34, 40, 49; 1897, s. 9 (6); 1903-8 Rules, r. 96. On. 1914, ss. 30, 37, 38, 48, 54, 68, 69.

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estates and interests "subject to the maintenance of the estate and right" of the registered owner. In the English Act of 1897 and the Rules the interest of a person entitled to be, but not yet registered, is referred to as "the right to be registered as proprietor . . . conferred by an instrument of transfer or charge," and "the right to apply for registration as first proprietor." The Ontario statute (s. 69) directly enacts that a registrable instrument is to "confer a right to be registered on the owner." In both jurisdictions the enactments treat an unregistered transfer or charge on the footing of instruments entitling the holders to deal with their interests as rights of property, but liable to be defeated by registered dispositions on the part of the registered owner. Apart altogether from the express permission to create estates and interests off the register,[10] the other enactments referred to are sufficient to make it clear that the right to registration conferred by an unregistered instrument is an equitable right, not to be distinguished for practical purposes from the ordinary equitable estate, assignable, and enforceable as a right of property against the registered owner.[11]

In Ireland,[12] "until the transferee is registered as owner of the land transferred" the instrument of transfer does "not confer on the transferee any estate in the lands," and so as to the creation and transfer of charges. Charges only cease to operate upon registration of discharge. "Any right in or over any registered land or registered charge" may also be created, but these are not to affect registered transactions for value. The court's jurisdiction as to "actual fraud and mistake" is expressly preserved. These provisions are to much the same effect as the English enactments, though the language is clearer and more direct. The enactment as to the effect of an unregistered instrument in not conferring "any estate in the lands" has, however, been interpreted strictly by the Irish courts, and held to mean that "no estate, legal or equitable, passed from the transferor to the transferee until registration."[13] The

[10] Eng. 1875, s. 49; On. 1914, s. 68. See, as to unregistered interests under statutory and non-statutory instruments, Own. & Inc. 150, 230. The whole subject of the nature of unregistered interests in these jurisdictions is made difficult by the judicial observations in *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631, 655 (as to which see Own. & Inc. 91, 121, 145, and elsewhere), and *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47, 75.

[11] *Barry* v. *Heider* (1914) 19 C. L. R. 197, though under an Australian statute, illustrates the distinction between an equitable interest binding on the registered owner, and a merely personal right of action against him.

[12] I. 1891, ss. 25, 34 (1), 35, 41, 42, 44, 95 (def. "right").

[13] *Pim* v. *Coyle* [1907] 1 I. R. 330. Other cases to the same effect are: *Torish* v. *Orr* [1894] 2 I. R. 381; *McGettigan* v. *Roulstone* [1910] 2 I. R. 17; *Mooney* v. *McMahon* [1911] 1 I. R. 125.

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cases are not consistent as to the value of a "right to be registered," this right being sometimes treated as practically equivalent to a complete equitable interest, and sometimes as a mere equity of no value at all as a right of property.[14] As the Irish case law now stands, it is impossible to say that the unregistered instrument does confer an interest of the same efficacy as the interest conferred in England and Ontario.

In Leeward Islands[15] unregistered transactions are expressly put on the footing of "contracts," and the unregistered instrument is spoken of as a mere "warrant to authorize" registration. Thus the effect of the statute is to make a transaction "rest in contract until registration."[16] The right to registration would seem to be a right of property on the footing of an equitable interest.

British Columbia[17] is anomalous in several respects. A regular deed registry is provided for in addition to the registration of title. It is also the only jurisdiction in which the statutes enact that unregistered instruments are not to "pass any estate or interest either *at law or in equity*" in land; the instrument is to "confer on the person benefited" and those claiming through him "by descent, purchase, or otherwise, the right to apply to have the same registered." The effect of a transfer is that the transferee is "entitled to be registered as the owner" of the former owner's estate or interest.

Notwithstanding the stringent enactment above quoted, the right to registration has been held to be so far a right of property as to prevent a registered judgment being conclusive against an unregistered conveyance or mortgage.[18] So with respect to a registered creditor's assignment—this was held not to be conclusive against an unregistered mortgage, which on registration would relate back to its date of creation.[19] And a purchaser who has not yet registered his conveyance has been held to be so far "the equitable owner of the land" as to be entitled to the compensation pay-

[14] With *Pim* v. *Coyle* (*supra*) compare *In re Furlong and Bogan's Cont.* (1893) 31 L. R. I. 191, where the right to first registration (not under a transfer) is called "an inchoate right incapable of being defeated, and only waiting for an official act to be performed to become an absolute estate."

[15] L. Is. 1886 (1914), ss. 6, 37, 51, 57, 168.

[16] *Lake Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491, 500; *In re Smith* [1916] 2 Ch. 206.

[17] B. C. 1911, ss. 102, 104, 105, 143-147.

[18] *Entwisle* v. *Lenz* (1908) 9 West. R. 17, 317 (B. C.); *Yorkshire Guarantee Corp.* v. *Edmonds* (1900) 7 B. C. R. 348. But these cases are now disapproved of and overruled respectively by *Bank of Hamilton* v. *Hartery* (1919) 58 Can. S. C. R. 338.

[19] *Westfall* v. *Stewart* (1907) 13 B. C. R. 111.

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able for injury to the land by a public authority.[20] Nor can a purchaser, in the absence of stipulation, insist on being registered before paying his vendor the purchase money.[21] In other circumstances the enactment has been construed strictly, and no interest (even equitable) held to pass until registration of the instrument purporting to convey it, the register being thus conclusive against such interest.[22]

The remaining sixteen jurisdictions can be treated as one group —Manitoba, Saskatchewan, Alberta, North-West Territories, the nine Australasian, with Jamaica, Trinidad-Tobago, and Federated Malay States.[23] There are some differences among these statutes, but the general position as to this group is that, under the statutory enactments and decisions on them, an unregistered instrument (in cases not specially excepted) passes no actual interest in the land that can be called an equitable estate in the ordinary sense, but an equitable interest of a contractual nature under the instrument, consisting of a right to be registered as the owner of the interest purporting to be conferred by the instrument.[24]

In the Federated Malay States there is a stringent enactment making transactions by non-statutory methods "null and void and of no effect."[25] This is to be construed as merely depriving the unregistered instrument of any operation as a transfer or incumbrance, and does not interfere with its operation as a contract.[26] The right to be registered conferred by such an instrument is to be treated as an assignable right of property, thus placing such a right higher than a mere contract.[27]

[20] *Re North Vancouver (City) and Jackson* (1914) 27 West. R. 456 (B. C.).

[21] *Thompson* v. *McDonald* (1914) 20 B. C. R. 223.

[22] *Levy* v. *Gleason* (1907) 13 B. C. R. 357; *Perry* v. *Morley* (1911) 16 West. R. 691 (B. C.); *Goddard* v. *Slingerland* (1911) 18 West. R. 324 (B. C.); *Howard* v. *Miller* [1915] A. C. 318, 326.

[23] M. 1913, ss. 91, 98; Sas. 1917, ss. 58, 205; Al. 1906, ss. 41, 46, 139; Can. 1906, ss. 4, 70, 71, 76; N. S. W. 1900, s. 41; Q. 1861, s. 43, and 1877, ss. 48, 51; S. A. 1886, ss. 67, 71, 246, 249; Tas. 1862, s. 39; V. 1915, s. 61; W. A. 1893, s. 58; P. 1913, ss. 28, 87, 126; N. Z. 1915, s. 38; Fi. 1876 (1906), ss. 39, 117; Tr. 1902, ss. 46, 60; J. 1888, s. 48; F. M. S. 1911, ss. 5, 25, 88.

[24] See *Shore* v. *Green* (1890) 6 Man. R. 322; *Jellett* v. *Wilkie* (1896) 2 Terr. R. 133, 26 Can. S. C. R. 282; *Barry* v. *Heider* (1914) 19 C. L. R. 197; *Howard* v. *Miller* [1915] A. C. 318, 326.

[25] F. M. S. 1911, s. 5.

[26] *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A. C. 209, 214; *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491, 500.

[27] See *Loke Yew* v. *Port Swettenham Rubber Co., supra.* In British Columbia this assignability is by statute expressly conferred on the person entitled under the contract: B. C. 1911, s. 104; *Howard* v. *Miller, supra.* In the Malay case just cited the assignee of the unregistered interest was treated in all respects as though he had been the person originally entitled under the contractual instrument.

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In Saskatchewan no interest is passed by the "unregistered instrument" except as against the "person making the same"; in Manitoba, Alberta, and North-West Territories, the interest does not pass "as against any bonâ fide transferee," and in South Australia rights under a contract for sale are expressly preserved, except against a registered owner "taking bonâ fide for valuable consideration."[28] There are also in Manitoba, Alberta, and Saskatchewan,[29] enactments making void, so far as they affect the land, certain instruments which purport to secure on the land the purchase money of chattels; such instruments operate as agreements to give a mortgage.[30]

In the statutes of Fiji and Federated Malay States reference is made to the theory that the unregistered instrument is not so much an assurance in itself as an authority to the registry to alter the register in favour of the transferee, &c., and this view also appears in the case law of other jurisdictions.[31]

In Manitoba, Queensland, South Australia, and Papua, the statutes enact that the unregistered instrument shall confer a "right or claim" to registration.[32] But it has been held that the law is the same in other Australian jurisdictions where there is no such enactment,[33] and this seems to be true of the Canadian and other jurisdictions.

The statutes in all sixteen jurisdictions enact that the unregistered instrument is to be ineffective to pass "any estate or interest" in land—in Fiji and South Australia "any land," and in Federated Malay States "any land or any interest therein." In Queensland, South Australia, Papua, and Fiji,[34] the statutes expressly preserve the jurisdiction of the courts with respect to fraud, unregistered dispositions, and equitable interests (in Saskatchewan, Alberta, and North-West Territories[35] "actual fraud" and "contracts for the sale or other disposition of land," and in Federated Malay States[36] "actual fraud.") But the rule as to protecting

[28] M. 1913, s. 91; Sas. 1917, s. 58 (relied on in *Union Supply Co.'s Case* [1918] 2 W. W. R. 305); Al. 1906, s. 46; Can. 1906, s. 70; S. A. 1886, s. 71.

[29] Manitoba—Lien Notes Act (R. S. 1913, c. 115), s. 4. Alberta—Charges on Land Act, 1910 (2nd Sess.), c. 5. Saskatchewan—Sas. 1917, ss. 99, 129, 130.

[30] *Imperial Elevator Co.* v. *Olive* (1914) 29 West. R. 339 (Sas.). See *post*, chap. VI. sect. 4, sub-sect. 2—"Other Equitable Mortgages."

[31] Fi. 1876 (1906), s. 7; F. M. S. 1911, s. 4. *Arnot* v. *Petersen* (1912) 21 West. R. 153 (Al.). (See *ante*, p. 115, as to Leeward Islands.

[32] M. 1913, s. 98; Q. 1877, s. 48; S. A. 1886, s. 246; P. 1913, s. 126.

[33] *Barry* v. *Heider* (1914) 19 C. L. R. 197.

[34] Q. 1877, s. 51; S. A. 1886, s. 249; P. 1913, s. 87; Fi. 1876 (1906), s. 117.

[35] Sas. 1917, s. 205; Al. 1906, s. 139; Can. 1906, s. 4.

[36] F. M. S. 1911, s. 88.

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unregistered interests has constantly been acted on by the courts in the absence of any such express enactments."[37]

The law in the sixteen jurisdictions is thus seen to be fairly uniform with respect to the relation of unregistered transactions to the registered ownership. On the whole, judged by at least one important test—assignability[38]—the right or interest taken under an unregistered instrument is in the nature of an equitable interest; and there seems to be no substantial distinction between an instrument in statutory form and an instrument in any other form.[39] There are a few cases which run counter to the main current of authority, and in which rights under unregistered instruments have been decided otherwise than in accordance with the principles above laid down.[40]

That the right or claim to registration conferred by an unregistered instrument does amount to an actual interest in the land is supported by another consideration. Whether voluntary or for value, the interest which the donor or transferor purports to part with is treated as a right of property and not a mere right of action. Pending registration, the transaction (if voluntary) may be treated as an imperfect gift and revocable.[41] If for value, however, the transaction cannot thus be treated as revocable, even though the transferor die,[42] or his title be declared void.[43]

The nature of the unregistered interest also appears incidentally in cases dealing with caveats, judgments and executions, equitable mortgages and equitable interests generally. These topics are treated separately elsewhere in this book.

[37] See *Barry* v. *Heider* (1914) 19 C. L. R. 197; Aust. Torr. Syst. 779; Can. Torr. Syst. 135, 136. In Manitoba there is no longer any such enactment, though it was contained in the statute, at the time of the decision in *Williams* v. *Box* (1909) 13 West. R. 451, 44 Can. S. C. R. 1.

[38] See *Barry* v. *Heider*, *supra*; *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491.

[39] See *McEllistcr* v. *Biggs* (1883) 8 A. C. 314; *Jellett* v. *Wilkie* (1896) 2 Terr. R. 133, 26 Can. S. C. R. 282; cases in preceding note. Some possible distinctions are pointed out in Aust. Torr. Syst. 777, 784-791.

[40] *Gilbert* v. *Ullerich* (1911) 16 West. R. 490, 17 West. R. 157 (Sas.), equitable mortgage, stated and criticized in Can. Torr. Syst. 129, and explained in *Imperial Elevator Co.* v. *Olive* (1914) 29 West. R. 339. *Seecharan* v. *Jugdeo Maraj* (1909) 1 Tr. & Tob. 344, judgment and unregistered transfer. *Johnson* v. *Billyard* (1890) 11 N. S. W. 319, Fiji lease in New South Wales; with this contrast *Shore* v. *Grecn* (1890) 6 Man. R. 322.

[41] *Anning* v. *Anning* (1907) 4 C. L. R. 1049, 1061; *Smith* v. *Smith* (1915) 31 West. R. 607 (Al.). See also *Hay* v. *Commr. of Stamps* (1911) 11 S. R. (N. S. W.), 304; Aust. Torr. Syst. 790, 791.

[42] See preceding note. In South Australia and Manitoba the validity of registration after death is expressly declared by statute: S. A. 1886, s. 59; M. 1913, s. 171.

[43] *Barry* v. *Heider* (1914) 19 C. L. R. 197; *Sheerin* v. *Sheerin* (1903) 5 N. Z. Gaz. 421.

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SECTION 6—NOTICE.

SUB-SECTION 1—HOW FAR THE REGISTER IS NOTICE.

To some extent the conclusiveness of the register is constituted by its being notice of the interests referred to in entries upon it, though the register is not always or necessarily notice to all the world.

Certain entries on the register are by the statutes expressly made notice for certain purposes in England, Ontario, and British Columbia, but apparently in no other jurisdictions. In England, and Ontario,[1] when "notice" of a lease has been registered, the registered owner and persons "deriving title through him," except owners of "incumbrances registered prior to the registration of such notice," are "deemed to be affected with notice" of the lease. Nothing is said about other persons dealing with the land.

In British Columbia[2] "the registration of a charge" gives "notice to every person dealing with the land" of the interest under the charge and the "contents" of the instrument. This appears to be the law in other jurisdictions, though not enacted by statute. It has been held in New Zealand that the prescribed method of registering a mortgage being by means of an entry on the register, by which the existence of the mortgage is disclosed, "it is the duty of all persons dealing with the property to examine the mortgage and see what it contains," and anything in the instrument "will be notice to all persons who are dealing with the property."[3] The same principle underlies those cases in which it is laid down that a proposing purchaser omits to search the register at his peril, and must be taken to have notice of what he would have found on search.[4]

There are, however, many cases in which omission to search the register has been held not to be such negligence as to be punished by loss of priority, &c. To this extent the entries on the register must be taken not to be notice. Thus, a purchaser is not bound to search with respect to the title of the transferor himself.[5] A mortgagor is not bound to search in order to discover whether his mortgagee is still the owner of the mortgage.[6] And if search is not on

[1] Eng. 1875, s. 50; On. 1914, s. 70.

[2] B. C. 1911, s. 72.

[3] *In re Goldstone's Mortgage* [1916] N. Z. R. 19 (affd. *ib.* 489); reference was made to Aust. Torr. Syst. 760, 945.

[4] See *In re Scanlan* (1887) 3 Q. L. J. 43; Aust. Torr. Syst. 849.

[5] *Russell* v. *Registrar-General* (1906) 26 N. Z. R. 1223; *Christie* v. *Taylor* (1914) 26 West. R. 673 (Al.).

[6] *Nioa* v. *Bell* (1902) 27 V. L. R. 82; Aust. Torr. Syst. 919; Own. & Inc. 170, 203, 204.

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other grounds required, even the entry of a caveat will not be such notice as to give priority to the interest covered by the caveat.[7]. A lis pendens on the register has been held not to be notice in itself.[8]

SUB-SECTION 2—EFFECT OF NOTICE OF UNREGISTERED INTERESTS.

The result of the existence of unregistered interests being brought to the notice of the registered owner may be to cut down the conclusiveness of the register so far as he is concerned.

In a few instances the statutes provide that the register is not to be conclusive if the owner either is affected with notice of some unregistered interest, or—what amounts to the same thing—is not a purchaser, &c., "bonâ fide" or "in good faith." For the most part however the statutes, in referring to notice, enact that it shall be ineffective for the purpose of making the registered title less conclusive—apart of course from any question of fraud. Particular transactions are sometimes protected in this way, but the most important enactments are those that deal with notice in general. In England, Leeward Islands, Fiji, and Federated Malay States, there is no such general enactment as to notice.

In England the statutes seem to contain only two distinct references to notice of the kind here considered—in connexion with transfer of charges, and indemnity for rectification of the register.[1] In one case the register might be inconclusive so far as the transferee was concerned and in the other the right to indemnity might be barred.

In the Leeward Islands statutes the only mention of notice seems to be in the enactments by which the cancellation of a wrongful registration or liability to damages are not to prejudice the rights of a "transferee or incumbrancee . . . bonâ fide without notice,"[2] thus implying the possible inconclusiveness of the register in the face of notice.

In the Fiji and Federated Malay States statutes the only mention of the effect of notice seems to be in the enactments which provide that "no sale or transfer under" an execution, &c., is to "be valid against a purchaser for valuable consideration" until the execution, &c., is registered, notwithstanding the purchaser "had actual [in Fiji "actual or constructive"] notice of" the execution,

[7] *Queensland Trustees* v. *Registrar of Titles* (1893) 5 Q. L. J. 46, 51; *Grace* v. *Kuebler* [1917] 1 W. W. R. 1213 (Al.), referring to citations in preceding note, affd. 56 Can. S. C. R. 1, approving of *Nioa* v. *Bell*.

[8] *Peck* v. *Sun Life Ass. Co.* (1905) 1 West. R. 302 (B.C.).

[1] Eng. 1875, s. 40 (am.); 1897, s. 7 (4).

[2] L. Is. 1886 (1914), s. 19.

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&c.[3] Here the notice is ineffective against the conclusiveness of the register.

In all these four jurisdictions the intention of the statutes seems to be that in general mere notice of unregistered interests is not to constitute an exception to the conclusiveness of the register—always excluding the case of fraud.[4] The real difficulty is to discover at what point notice becomes fraud. Nearly all the cases on the subject have arisen under statutes which contain a general enactment as to notice, expressly distinguishing it from fraud. In the only case that is strictly relevant under a statute in which notice and fraud are not distinguished, there is a tendency to give a wide meaning to fraud and make it include any dishonest conduct.[5] In many modern cases there is, however, a tendency to construe registration statutes strictly, and with less reliance than formerly on the maxim "Notice is fraud."[6] Perhaps one may say (in view of the two cases cited) that any conduct amounting to dishonesty in obtaining an interest and then registering it for the purpose of shutting out a competing and unregistered interest is fraud, but that it is not fraud to insist on priority by registration where the interest thus registered was not obtained with any such purpose. This differs little from such a formula as: "Mere knowledge of the existence of an unregistered interest is not fraud."[7]

Whatever may be the extent to which the registered title is in these four jurisdictions protected against the effect of the owner becoming registered with notice of unregistered adverse claims or interests, it is quite clear that the doctrine of notice is unaffected so far as unregistered interests are concerned, and that the owner of an unregistered interest in registered land is as amenable to the full effects of the doctrine of notice as he would be with respect to ordinary land and the general law.[8]

In the other eighteen jurisdictions the statutes also contain enactments as to the effect of notice under particular circumstances, and in addition enactments on the effect of notice generally.

In Ireland[9] notice of a settlement referred to on the register

[3] Fi. 1876 (1906), s. 91; F. M. S. 1914, s. 68.

[4] See Own. & Inc. 150, 257-259; Br. & Sh. 13, 14. As to notice and fraud, L. Q. R. xxix. 434, xxxi. 397.

[5] *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491, discussed in L. Q. R. (preceding note).

[6] For instance, *In re Monolithic Build. Co.* [1915] 1 Ch. 643, 667, folld. in New Zealand in *Zachariah* v. *Morrow* (1915) 34 N. Z. R. 885. And see the judgments in the Courts below in the *Loke Yew* case: Innes F. M. S. 215, 243.

[7] See Own. & Inc. 259.

[8] An illustration is *Yio Thon Seng* v. *Cheng Sing* (1912) Innes F. M. S. 182.

[9] I. 1891, ss. 71, 82 (3).

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is not necessarily notice of the trusts of the settlement. Apparently it is only in Ireland that notice (or "knowledge") of the omission to send or receive some statutory notice affects the conclusiveness of the registered title.

In New South Wales, Tasmania, Victoria, Western Australia, Alberta, North-West Territories, and Jamaica,[10] notice to a purchaser of a vendor's inability, through fraud or otherwise, rightfully to complete a sale, will make the vendor's registered title inconclusive so far as concerns his right to specific performance against the purchaser.

In Alberta[11] a contract for sale is expressly made assignable, but the conclusiveness of the vendor's registered title is not affected until notice in writing of the assignment has been given him.

In Queensland and Papua[12] a purchaser or mortgagee from trustees is not affected by notice of the trusts, nor (in Queensland as to friendly societies, &c.) by notice of such matters as the invalidity of the appointment of officers of a society.

In the seven Australian jurisdictions, New Zealand, Trinidad-Tobago, and Jamaica,[13] until registration of a writ of execution the register remains conclusive in favour of a purchaser or mortgagee from the registered owner, notwithstanding that the purchaser, &c., had notice of the existence of the writ.

In all these jurisdictions, except Ireland, Ontario, and British Honduras, persons becoming registered as purchasers or mortgagees "bonâ fide for value" are accorded special protection in case of their vendor or mortgagor having been registered through fraud or mistake.[14] The reference to bonâ fide transactions is rather emphasized by the fact that in a few instances purchasers "for value" simply are protected.[15] "Bonâ fide" here seems to mean without "notice, knowledge, or the means of knowledge" of the defect in

[10] N. S. W. 1900, s. 44; Tas. 1862, s. 115; V. 1915, s. 71; W. A. 1893, s. 67; Al. 1906, s. 136; Can. 1906, s. 175; J. 1888, s. 54. See *Colonial Bank* v. *Pie* (1880) 6 V. L. R. 186, 193, where the enactment is called an "odd provision."

[11] Al. 1906, s. 101.

[12] Q. 1861, s. 79; 1877, s. 22. P. 1913, s. 86 (3). The first of these Queensland sections is partially abrogated by the Trustees of Public Lands Act 1869 (No. 2); see *Down* v. *Att.-Gen.* (1905) 2 C. L. R. 639, 647.

[13] N. S. W. 1900, s. 105 (3); Q. 1861, s. 91; S. A. 1886, s. 106; Tas. 1862, s. 94; V. 1915, s. 178; W. A. 1893, s. 133; P. 1913, s. 112 (1); N. Z. Sup. Ct. Rules, r. 317 (Judicature Act 1908 (No. 89), sch. 2, Hutch. 123); Tr. 1902, s. 93; J. 1888, s. 102.

[14] See under "Voluntary Transactions," sect. 4, *ante*, p. 107.

[15] For instance: Q. 1877, s. 51; P. 1913, s. 87; V. 1915, s. 72; W. A. 1893, s. 68; Tr. 1902, s. 47.

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the predecessor's title, as has been held in the case of misdescription of boundaries.[16]

In many of these jurisdictions there is an enactment by which claims for the recovery of land or compensation, or both, are barred in cases where the claimant had notice of the intended registration and took no steps to enforce his claim.[17]

In all eighteen jurisdictions the statutes contain enactments relating to notice in general, and differentiating it from fraud. In twelve the enactments are substantially uniform, viz., New South Wales, South Australia, Tasmania, Victoria, Western Australia, New Zealand, Manitoba, Saskatchewan, Alberta, North-West Territories, Trinidad-Tobago, Jamaica.[18] The New South Wales enactment may be taken as representative of all:

> Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer from, the registered proprietor of any registered estate or interest, shall be required or in any manner concerned to enquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

The Queensland enactment, with which the Papua enactment is all but verbally identical, is:[19]

> A transferee, whether voluntary or not, of land under the provisions of this Act shall not, except in the case of fraud, be affected by actual or constructive notice of any claims, rights, titles, or interests other than those which have been notified or protected by entry on the register-book according to the provisions of this Act, any rule of law or equity to the contrary notwithstanding. [13 Eliz. not to be affected.]

[16] *Hay* v. *Solling* (1895) 16 N. S. W. 60, 67, under a section now standing as N. S. W. 1900, s. 124.

[17] M. 1913, s. 161; Sas. 1917, s. 169; Al. 1906, s. 110; Can. 1906. s. 149; N. S. W. 1900, s. 130 (3); S. A. 1886, s. 216; Tas. 1862, s. 130; V. 1915, s. 256; W. A. 1893, s. 211; N. Z. 1915, s. 196; Tr. 1902, s. 139; J. 1888, s. 141. An illustration is *Bell* v. *Beckman* (1889) 10 N. S. W. Eq. 251.

[18] N. S. W. 1900, s. 43; S. A. 1886, ss. 186, 187; Tas. 1862, s. 114; V. 1915, s. 179; W. A. 1893, s. 134; N. Z. 1915, s. 197; M. 1913, s. 99; Sas. 1917, s. 194; Al. 1906, s. 135; Can. 1906, s. 167; Tr. 1902, s. 130; J. 1888, s. 56. But by s. 7 of the Saskatchewan Homesteads Act (1915, c. 29) "knowledge" of a wife's rights is "fraud" in a transferee, etc.

[19] Q. 1861, s. 109; P. 1913, s. 30. The differences between these and other Australian enactments. by reason of the words "whether voluntary or not," is referred to under "Voluntary Transactions," sect. 4 *ante*, p. 107.

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It will be observed that the final clause of the other enactments, as to "knowledge" not being imputed as "fraud," is absent in Queensland and Papua, as also in Ireland, Ontario, British Columbia, and British Honduras, to be now referred to. The Irish enactment is:[20]

> The register shall be conclusive evidence of the title of the owner as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but . . . on the ground of actual fraud or mistake [rectification may be ordered]

This has some resemblance to the Ontario enactment, which is:[21]

> No person other than the parties thereto shall be deemed to have any notice of the contents of any instruments other than those mentioned in the existing register of title of the parcel of land, or which have been duly entered in the books of the office kept for the entry of instruments received, or are in course of entry.

Fraud is not here mentioned, being dealt with in a separate enactment (s. 121). In neither Irish nor Ontario enactments is the clause found by which "knowledge" is "not of itself . . . imputed as fraud." The British Columbia enactment is to much the same effect in different language; fraud is not mentioned, being made a general exception in another place (s. 22). The enactment as to notice is:[22]

> No purchaser for valuable consideration of, or holder of a charge or incumbrance on, any registered real estate or registered interest in real estate, or as to which registration is pending, shall be affected by any notice, express, implied, or constructive, of any title, interest or disposition affecting such real estate, which is not registered, or the registration of which is not pending, other than a leasehold interest in possession for a term not exceeding three years, any rule of law or equity to the contrary notwithstanding.

The British Honduras enactment differs in form from all the preceding, being part of a schedule of rules relating to "caveats and equitable interest, &c." The statute elsewhere (s. 43) enacts that fraudulent entries are "void as between all parties privies to such fraud." The enactment as to notice is:[23]

> When application is made to the registrar to transfer registered lands to a purchaser, and there is no caveat lodged, or if lodged such caveat has been removed, the registrar may make such transfer although in point of fact the said lands may be incumbered, and an

[20] I. 1891, s. 34 (1).
[21] On. 1914, s. 80.
[22] B. C. 1911, s. 104 (2).
[23] B. H. 1914, sch. D, r. 12.

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alienee for valuable consideration to whom the said lands are transferred shall take the said lands free from all incumbrances, whether such alienee have notice thereof or not.

The omission, in six out of these eighteen jurisdictions, to state in express terms that knowledge of an unregistered interest is not of itself to be imputed as fraud, is hardly sufficient to make the construction of these six enactments different from that of the other twelve. It is definitely enacted that notice of an unregistered interest is not to affect the registered title, and this together with the plain exception of fraud seems sufficient to make it clear that mere notice is not necessarily to be "imputed as fraud" in these six jurisdictions any more than in the other twelve. Most of the cases under the relevant enactments have resulted in notice being held either insufficient, or else effective as amounting to fraud in the particular circumstances.[24] But it has been laid down in British Columbia that the effect of the enactment now standing as B. C. 1911, s. 104 (2) "must be taken as absolutely protecting a purchaser for value against attack on the ground of notice of any character," subject to the qualification that a man with actual notice deliberately relying on the words of the enactment "must be held to be guilty of actual fraud."[25] And in Ireland the doctrine of notice has been "swept away by the 34th section of the Act, and replaced by the principle of relief against fraud in which it had its origin."[26] In Queensland (and Papua will be on the same footing) cases under other Australasian enactments are treated as authoritative.[27]

These general enactments relating to notice contemplate the possibility of the registered owner receiving notice of unregistered interests either before or after he is registered. Mere notice received only after due registration is almost necessarily inoperative as being inconsistent with the scheme of a conclusive register, and fraud or mistake would require to be superadded in order to make notice effective in such a case. The enactments are chiefly important with respect to notice received before the person receiving it is formally placed on the register as owner. As to this, a difficulty has arisen on the construction of these enactments, and the question

[24] Under On. 1914, s. 80: *In re Skill and Thompson* (1908) 17 O. L. R. 186; and see *Dodds* v. *Harper* (1916) 37 O. L. R. 37. Under B. C. 1911, s. 104 (2); *Hudson's Bay Co.* v. *Kearns* (1896) 3 B. C. R. 330, 4 B. C. R. 536; *Chapman* v. *Edwards* (1911) 19 West. R. 266 (approved of, on ground of fraud, in *Bank of Hamilton* v. *Hartery* (1919) 58 Can. S. C. R. 338).

[25] *Hudson's Bay Co.* v. *Kearns, supra.* And see *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491.

[26] *In re Walsh* [1916] 1 I. R. 40.

[27] See Power's R. P. Acts, 144-147.

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has been raised whether a purchaser is amenable to notice at any time before being registered, or whether the initiation of his negotiations with the registered owner entitles him to disregard all adverse claims of which notice is received only after the initiation.

The enactments have been taken, in several cases,[28] to mean that a person who acquires any merely equitable interest from a registered owner gains some statutory protection under these enactments —that he is entitled, in fact, to rely on his vendor's registered title before he is himself registered. Both on principle and the balance of authority this view, as thus widely stated, seems inadmissible. Even those unregistered equitable interests that do receive a very special recognition—as equitable mortgages by deposit of certificate of title [29]—are not protected under these enactments relating to notice in general.[30] The immunity which the purchaser is to enjoy from the effect of notice is only to be afforded him if and when he does become registered, and not before.[31] Before he does become registered, it is open to any adverse claimant to step in and assert his claim, and for the purpose of trying this claim registration may be stayed—by caveat or otherwise.[32] Under many circumstances the unregistered purchaser will have a superior equity in his claim to registration, and in such cases his rights do for practical purposes crystallize at the moment of the contract for sale coming into existence. Thus, a purchaser from a mortgagee can resist the mortgagor's claim to redeem before registration of the purchaser's formal transfer.[33]

The doctrine of notice is not, in fact, affected by these enactments except as regards registered interests, and any questions of priority between unregistered interests that depend on that doctrine will have to be decided on general principles of equity jurisprudence; even an accidental failure to obtain registration will not prevent those principles being applied, to the exclusion of the statu-

[28] *Public Trustee* v. *Arthur* (1892) 25 S. A. R. 59, 83; *Cooper* v. *Anderson* (1912) 20 West. R. 347 (Man.); *Arnot* v. *Peterson* (1912) 21 West. R. 123 (Al.); *Bain* v. *Pitfield* (1916) 31 West. R. 681 (Man.). Some of these cases are stated in Can. Torr. Syst. 176. See also *North-West Construction Co.* v. *Valle* (1906) 4 West. R. 37 (Man.).

[29] See chap. VI., sect. 4, sub-sect. 1. *post.*

[30] See, for example *General Finance Co.* v. *Perpetual Executors Assoc.* (1902) 27 V. L. R. 739.

[31] *Cowell* v. *Stacey* (1887) 13 V. L. R. 80; *Baker's Creek G. M. Co.* v. *Hack* (1894) 15 N. S. W. Eq. 207; *Sol.-Gen.* v. *Merc Tini* (1899) 17 N. Z. R. 773; *Crout* v. *Beissel* [1909] V. L. R. 207; *Chapman* v. *Edwards* (1911) 19 West. R. 266 (B. C.); *Wallace* v. *Smart* (1912) 19 West. R. 787 (Man.), where the purchaser (though registered) was registered expressly subject to the adverse claim.

[32] Cases in preceding note.

[33] *Saltmon* v. *McColl* (1909) 12 West. R. 146, 14 *ib.* 91 (Man.)

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tory modification of the doctrine of notice.[34] On the other hand, even an accidental success in obtaining registration will oust, as far as a registered owner is concerned, the application of these principles, and nothing short of fraud will be allowed to deprive the owner of the advantage of his registered title.[35] These enactments as to notice are merely ancillary to those others whose primary object is to make the register conclusive, and are not intended to make notice ineffective against any but registered owners[36]—thus adding nothing substantial to enactments which simply make the register conclusive. Cases in which registration has been set aside by reason of the registered owner having got on the register with notice of an adverse interest can only be upheld on the ground that the notice really amounted to fraud.[37]

It should be observed that these enactments which refer to purchasers before registration do distinctly relieve the proposing purchaser from the necessity of enquiring into the circumstances of his vendor's acquisition of a registered title, or of seeing to the application of purchase money, apart from making notice ineffective.[38] But these provisions seem only to be designed to make it clear that the absence of such enquiry, &c., is not to be treated as constructive notice, and has no effect in strengthening the position of the purchaser if he does receive notice of circumstances which make it fraudulent to proceed to registration.[39]

Notice being thus differentiated from fraud in all these jurisdictions (as distinguished from the four referred to *ante* p. 120), the difficulty has been to draw the dividing line between notice that is by the statutes made ineffective, and notice that amounts to fraud.

In some cases notice of adverse claims or interests has been

[34] *George* v. *Aust. Mut. Prov. Soc.* (1885) 4 N. Z. S. C. 165; *Barnes* v. *James* (1901) 27 V. L. R. 749; *General Finance Co.* v. *Perpetual Executors Assoc., supra; In re Hope & Co.'s Petition* (1903) Jamaica, unreported; *Crout* v. *Beissel, supra; Barry* v. *Heider* (1914) 19 C. L. R. 197.

[35] *Butler* v. *Fairclough* (1917) 23 C. L. R. 78, on this point the dissenting judgment being to the same effect as that of the majority; *Zachariah* v. *Morrow* (1915) 34 N. Z. R. 885.

[36] See particularly *Sol.-Gen.* v. *Mere Tini* (*supra*) as to reading the various enactments together; ss. 189, 36, 56, and 190 of the 1885 statute now stand as N. Z. 1915, ss. 197, 38, 59, 198.

[37] Illustrations are: *Colonial Bank* v. *Pie* (1880) 6 V. L. R. 186; *Sheerin* v. *Sheerin* (1903) 5 N. Z. Gaz. 421; *Tasker* v. *Carrigan* (1909) 11 West. R. 621 (Sas.); *Chapman* v. *Edwards* (1911) 19 West. R. 266 (B.C.)—approved of in Sup. Ct. Can. *ante*, p. 125; *Robinson* v. *Ford* (1914) 31 West R. 13 (Sas.).

[38] See *Colonial Bank* v. *Pie* (1880) 6 V. L. R. 186, 193; *Perpetual Trustee Co.* v. *Cowan* (1900) 21 N. S. W. Eq. 278, 301.

[39] See *George* v. *Aust. Mut. Prov. Soc.* (1885) 4 N. Z. S. C. 165; *Fels* v. *Knowles* (1906) 26 N. Z. R. 604; *Quill* v. *Hall* (1908) 27 N. Z. R. 545.

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accompanied by conduct not strictly honest, and indicating "a low moral perception"; this has been held not to be fraud for the purpose of these enactments, and so ineffective as notice against the registered title.[40] These cases perhaps would hardly be followed in all jurisdictions at the present day, but they represent the tendency shewn in modern cases to construe statutes according to their plain language, and allow persons with opposing interests to stand on their legal rights.[41]

Other cases, in which notice of adverse claims or interests have not been accompanied by any dishonesty or overreaching, stand on a firmer footing, and in the absence of actual fraud notice is not allowed to have any effect on the registered title.[42] Such cases as these, where the advantage obtained by registration has been gained through the slackness or carelessness of the owner of the adverse interest, receive considerable support from the principle (above referred to) under which an advantage may legitimately be acquired by standing on the legal right conferred by a statute.[43]

Notwithstanding some earlier cases to the contrary, it must now be taken as established that no notice of adverse claims or interests that can only be treated as fraud constructively, or by the extension of equitable doctrines, but implies no dishonesty of conduct, will be effectual against the registered title.[44]

Perhaps the cases most difficult to deal with, as to whether the notice amounts to fraud or not, are those in which the unregistered interest is not technically adverse to the registered title, but represents a beneficial interest which a former registered owner was bound to protect. Such cases usually involve the question of trustees' powers being properly exercised, and how far the person taking title from the trustees has been justified in ignoring the existence of the beneficiaries' interests. Apparently, nothing short of an

[40] *Robertson* v. *Keith* (1870) 1 V. R. 11; *Lake* v. *Jones* (1889) 15 V. L. R. 728; *Rounsevell* v. *Ryan* [1910] S. A. R. 67.

[41] See *In re Monolithic Build. Co.* [1915] 1 Ch. 643, referred to *ante*. p. 121. The language of the Privy Council in *Loke Yew* v. *Port Swettenham Rubber Co.* [1915] A. C. 491, does not however encourage a narrow interpretation of "fraud." And as to what conduct will be considered "fraud," see *Syndicat Lyonnais* v. *McGrode* (1905) 36 Can. S. C. R. 251; *Annable* v. *Coventry* (1912) 46 Can. S. C. R. 573; *Sydie* v. *Saskatchewan and Battle River Co.* (1913) 25 West. R. 570 (Al.), where Aust. Torr. Syst. 835 is referred to.

[42] *Nicholson* v. *Bank of New Zealand* (1894) 12 N. Z. R. 427; *Oertel* v. *Hordern* (1902) 2 S. R. (N. S. W.) Eq. 37; *Shaw* v. *Bailey* (1907) 6 West. R. 197 (Man.); *Butler* v. *Fairclough* (1917) 23 C. L. R. 78.

[43] See *In re Monolithic Build. Co., supra.*

[44] *Assets Co.* v. *Mere Roihi* [1905] A. C. 176; *North-West Construction Co.* v. *Valle* (1906) 4 West. R. 37 (Man.); *Colonial Bank* v. *Pie* (1880) 6 V. L. R. 186; *Zachariah* v. *Morrow* (1915) 34 N. Z. R. 885; *Ross* v. *Stovall* [1919] 1 W. W. R. 673; *Union Bank of Canada* v. *Boulter Waugh Lim.* (1919) 58 Can. S. C. R. 385; *Dominion Fire-brick Products Lim.* v. *Pollock* [1919] 2 W. W. R. 245 (Sas.).

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attempt to acquire the registered title by some dishonesty, and with the purpose of defeating the beneficiaries' interests, will make the registered title inconclusive when once vested in a purchaser or mortgagee.[45] Cases in which it was held unnecessary for a purchaser to enquire into the circumstances behind the registered title of a trustee, and specific performance was ordered, are à fortiori authorities for the position that no notice short of notice of an intended breach of trust would ordinarily be sufficient to derogate from the conclusiveness of the purchaser's title when once registered.[46]

SECTION 7—MISTAKE.

In the statutes of Fiji, Federated Malay States, and British Honduras, mistake is not referred to at all in connexion with the conclusiveness of the register—apart, of course, from any adverse claims that are allowed (as in British Honduras) to be put forward. In other jurisdictions mistake is referred to as a ground for the register being inconclusive in one way or another. The principle underlying the legislation seems to be that, on the whole, mistake is to be treated somewhat like fraud, so that complete conclusiveness of title can only be obtained by purchasers for value bonâ fide and duly registered.

Notwithstanding the absence of any express reference to mistake in the statutes of Fiji, Federated Malay States, and British Honduras, it seems indisputable that mistake would under many circumstances be treated there also on much the same footing as fraud.[1]

In four jurisdictions—England, Ireland, Ontario, Leeward Islands[2]—mistake or error in bringing about registration is more distinctly referred to as a general ground for the register being regarded as inconclusive, either with respect to the actual title or lia-

[45] *Smith* v. *Essery* (1891) 9 N. Z. R. 49; *Cooke* v. *Union Bank* (1893) 14 N. S. W. Eq. 280; *Gregory* v. *Alger* (1893) 19 V. L. R. 565; *Crout* v. *Beissel* [1909] V. L. R. 207.

[46] See *George* v. *Aust. Mut. Prov. Soc.* (1885) 4 N. Z. S. C. 165; *Fels* v. *Knowles* (1906) 26 N. Z. R. 604; *Quill* v. *Hall* (1908) 27 N. Z. R. 545.

[1] See *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491. This case has been followed in New Zealand and there treated as covering the case of a transfer differing by mistake from the contract of sale: *Taitapu Gold Estates* v. *Prowse* [1916] N. Z. R. 825.

[2] Eng. 1875, s. 95, and 1897, s. 7; I. 1891, ss. 34, 93; On. 1914, ss. 115, 124; L. Is. 1886 (1914), ss. 19, 134. "Mistake" is the word used in the English and Irish, "error" in the Ontario enactments; in Leeward Islands the expression is "wilful misrepresentation or otherwise," which seems to include mistake.

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bility for compensation. Rectification of the register rather than indemnity for loss is regarded as the proper remedy, but a close comparison of the statutes of these four jurisdictions with others will shew that the difference is not so great as at first appears. In England and Ontario rectification can only be made "subject to any estates or rights acquired by registration," and this effectually protects bonâ fide purchasers for value who are duly registered; in Ireland the court may "on the ground of actual fraud or mistake" order rectification "in such manner and on such terms as it thinks just," and though duly registered titles are not directly and in terms protected, there seems to be sufficient protection implied in favour of bonâ fide transactions for value.[3] In Leeward Islands the "certificate of title" that has been "wrongfully issued" is to be called in for cancellation, without prejudice to the rights of any "transferee or incumbrancee . . . bonâ fide for value without notice."[4] In England and Ontario, though "mistake" is not expressly made a ground of rectification as in Ireland, yet the implication to the same effect seems quite clear.

Where rectification cannot be effected, and the registered owner is not a purchaser for value, he may be liable for indemnity; this is referred to in Sect. 10 *post*—"Liability to rightful owner," &c.

In these four jurisdictions no distinction is drawn by the statutes between one kind of mistake and another as affecting the conclusiveness of the registered title to the land itself, though in Ontario "wrong description of the property or otherwise" is referred to in connexion with the registered owner's liability for pecuniary damages.[5] But a distinction between mere misdescription and actual want of title must almost necessarily be made,[6] and the distinction is clearly implied in England, Ireland, and Ontario, by the fact that the conclusiveness of the register does not as a rule extend to boundaries.[7] In Ireland a distinction is also made between "actual fraud or mistake" and "error" of "misstatement, misdescription, omission, or otherwise," the latter being rectifiable "without injury to any other person."[8]

[3] Some Irish cases are: *Goodisson* v. *Goodisson* [1913] 1 I. R. 31; *In re Walsh* [1916] 1 I. R. 40; *In re Buckley* [1917] 1 I. R. 47.

[4] It is possible that the Australian case of *Registrar of Titles* v. *Esperance Land Co.* (1899, 1 W. A. R. 1, 8) may apply to the Leeward Islands enactment, when the mistake is one of "counting the land twice over."

[5] On. 1914, s. 124 (2).

[6] See, for instance, *Zock* v. *Clayton* (1912) 28 O. L. R. 447, which would be equally applicable in the Australian jurisdictions.

[7] Eng. 1897 s. 14 (2), and 1903-8 Rules, rr. 269-274; I. 1891, ss. 55-60, and 1910 O. 9; On. 1914, ss. 24 (2), 98.

[8] I. 1891, s. 34. See *In re Walsh* (1916) 1 I. R. 40. An Ontario case is *Perry* v. *Vise* (1919) 45 O. L. R. 117.

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The initial registration of an owner on the strength of a bad or imperfect title can be described literally as a mistake. In some respects a first registered owner resembles a volunteer as contrasted with a purchaser for value, but—as pointed out *ante*, p. 109, under "Voluntary transactions"—initial registration on a bad title is better treated under the head of Mistake. That an owner, thus wrongfully registered, could not rely on the register as completely conclusive in his favour seems clear; if the register could not be rectified against him he would usually be liable for indemnity. A difficulty is raised by the words "subject to estates or rights acquired by registration" in the English and Ontario statutes. It is possible to construe these words as referring to all cases of initial and subsequent registration, to cases of subsequent registration only (excluding initial registration), or to cases of subsequent registration and also cases of initial registration where the applicant's title is not a legal fee simple.[9] On their proper construction it will depend in some degree whether an owner registered with a bad title loses the land or pays indemnity instead. The liability to pay indemnity as one kind of inconclusiveness of the register is dealt with in Sect. 10, *post*.

In the remaining fifteen jurisdictions mistake generally is not by the statutes made so distinctly a ground for disputing the conclusiveness of the register as in the four just referred to. Where the register is inconclusive by reason of mistake, indemnity rather than rectification is often regarded as the more appropriate remedy. Owing to the fact that a strict time limit (usually six years) is set for claims of indemnity, the existence of a right to indemnity is sometimes lost sight of in cases where rectification on the ground of mistake has been refused.[10] Rectification however may sometimes be had when no rights of third parties have intervened,[11] but not always when there has been a common mistake, and the registered owner is not affected by any notice prior to registration amounting to fraud.[12]

In eleven jurisdictions—New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Papua, New

[9] See Own. & Inc. 257; *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47, 73, 76, 77. This third alternative is suggested by a writer in the Solicitors' Journal for Jan. 16, 1909 (vol. 53, p. 194).

[10] See *Bonnin* v. *Andrews* (1878) 12 S. A. R. 153; *Coleman* v. *Riria Puwhanga* (1885) 4 N. Z. S. C. 230; *Hamilton* v. *Iredale* (1903) 3 S. R. (N. S. W.) 535; *Assets Co.* v. *Mere Roihi* [1905] A. C. 176.

[11] *Taitapu Gold Estates* v. *Prowse* [1916] N. Z. R. 825, follg. *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491.

[12] *Zachoriah* v. *Morrow* (1915) 34 N. Z. R. 885, follg. *In re Monolithic Build. Co.* [1915] 1 Ch. 643.

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Zealand, British Columbia, Trinidad-Tobago, Jamaica [13]—the statutes mention three kinds of mistake by way of exception to the conclusiveness of the register with respect to the title to the land itself: —(1) Where another person is already registered as owner in respect of the same interest; (2) Where an easement is omitted or misdescribed — in South Australia if not otherwise "barred or avoided," and in British Columbia a "public easement"; (3) Where the parcels are misdescribed, and (except in British Columbia) the registered owner is not a purchaser or mortgagee bonâ fide for value from a registered predecessor. In each jurisdiction (including British Columbia) there is an enactment protecting registered purchasers and mortgagees notwithstanding any "error" in the registration of the vendor or mortgagor with respect to description of parcels "or otherwise."

Easements have been referred to in Sect. 1, *ante*, p. 101.

The Australasian cases on double or conflicting registration,[14] and also on misdescription of parcels,[15] apply in others of these jurisdictions. These two classes of mistake overlap to some extent, but it is clear that cases of double or conflicting registration do not include cases of mere misdescription, and that cases of misdescription may incidentally involve double registration.

This double or conflicting registration referred to as a case of the registration being inconclusive occurs when some person is registered in respect of an interest, already standing on the register in the name of another, through some substantial mistake as to title, and not merely as to the identity, area, or boundaries of the parcels. When such a mistake occurs the registration first in date prevails and remains conclusive, while the later in date is avoided. It is of course impossible that the register should literally be conclusive as to the ownership of both persons, though one may be entitled to indemnity. Where the mistake is one of misdescription, and the result is that the whole or part of the first owner's registration is cancelled and the later owner registered in place of the former, this is not double or conflicting registration so as to make the second registration necessarily inconclusive;[16] the conflicting claims of the two owners are dealt with on a different principle. Double or conflicting registration occurs where the second applicant

[13] N. S. W. 1900, ss. 42, 124, 135; Q. 1861, ss. 44, 123, 126; S. A. 1886, ss. 69, 207; Tas. 1862, ss. 40, 124, 126; V. 1915, ss. 72, 244, 247; W. A. 1893, ss. 68, 199, 202; B. C. 1911, ss. 22 (1), 25A, 124; Tr. 1902, ss. 47, 132, 135; J. 1888, ss. 55, 135, 137. As to Ontario, see preceding notes.

[14] See Aust. Torr. Syst. 823; Hutch. 77-82.

[15] See Aust. Torr. Syst. 824, 828; Hutch. 81.

[16] *Hassett* v. *Colonial Bank* (1881) 7 V. L. R. L. 380.

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for registration, having no title to the land at all owing to the same land being already registered as the property of another person, is yet placed on the register as owner. This usually happens through some mistake in the registry, sometimes aided by the negligence of the applicant, and may occur either by way of initial registration [17] or in the course of a transaction with land already registered.[18] The case of a purchaser registered under a tax sale, bad for want of proper notices, has been treated as one of registration to be set aside in favour of a prior and conflicting registration.[19]

The distinction between having no title to the property and misdescribing it is not always easy to draw. It is not a misdescription of the land if the applicant for registration describes it correctly and gets registered in respect of it by the same description;[20] but a mistake as to the identity of the owner may be a misdescription quite as much as a mistake in the area or the measurement of boundaries.[21] On the other hand, the applicant may have made no mistake, and may be registered in respect of land for which he has not applied; this, when the land is already in another person's name, is not always treated as a case of misdescription, but sometimes as want of title resulting in double registration.[22]

Misdescription may consist of error in the statement of the area of the land,[23] the boundaries [24]—the commonest case—or some fact connected with the identity of the property or its owner.[25] The presumption, where registrations do overlap in cases of mere misdescription, as to prior date of registration conferring conclusive title, is of the weakest, though this priority is often referred to in cases where the mistake is in the subsequent registration.[26] The register, as constituted by an owner's certificate of title, has to be construed like any other document, and the "identity" of land "is

[17] *Oelkers* v. *Merry* (1872) 2 Q. S. C. R. 193; *Zock* v. *Clayton* (1912) 28 O. L. R. 447, an illustrative Ontario case referred to *ante* p. 130.

[18] *Miller* v. *Davy* (1889) 7 N. Z. R. 515; *Registrar of Titles* v. *Esperance Land Co.* (1899) 1 W. A. R. 118.

[19] *Wallbridge* v. *Steenson* [1918] 2 W. W. R. 801 (Sas.). So where the registration of a public authority was set aside: *Sutherland* v. *Spruce Grove Municip.* [1919] 1 W. W. R. 274 (Al.).

[20] *Hamilton* v. *Iredale* (1903) 3 S. R. (N. S. W.) 535.

[21] *Hassett* v. *Colonial Bank* (1881) 7 V. L. R. L. 380.

[22] *Registrar of Titles* v. *Esperance Land Co.*, *supra*. But this will not exclude the right to indemnity from State funds.

[23] *Burden* v. *North Alberta Registrar* (1913) 25 West. R. 460 (Al.); *Hansen* v. *Franz* (1918) 57 Can. S. C. R. 57; in Alberta the register is never conclusive in respect of parcels misdescribed: see *post*.

[24] Cases in Aust. Torr. Syst. 823, 828.

[25] *Hassett* v. *Colonial Bank*, *supra*; *Hamilton* v. *Iredale*, *supra*.

[26] *Lloyd* v. *Mayfield* (1885) 7 Aust. L. T. 48; *Stevens* v. *Williams* (1886) 12 V. L. R. 152; *Registrar of Titles* v. *Esperance Land Co.* (1899) 1 W. A. R. 118; *National Trustees Co.* v. *Hassett* [1907] V. L. R. 404, 416.

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not necessarily to be determined by a mere literal application of the description contained in the certificate of title to the locus in dispute."[27] Sometimes, of course, misdescription does not involve any double registration or overlapping of registration, but land not yet on the register is erroneously included in the registered owner's title.[28] As already stated, the mere mistake of including land to which the applicant for registration has no title is not necessarily a misdescription for the purpose of making the register inconclusive.[29]

Even if the mistake is one of misdescription merely, and not substantially one of double registration or "no title," the registered owner may still be able to rely on his registration as conclusive if he can shew that he is a purchaser or mortgagee bonâ fide for value from an owner already registered.[30] But the consequences of mistake—whether in description of parcels or otherwise—in the case of initial registration are different. The initial registration may be conclusive as to the title to the land itself, but may still leave the first registered owner liable to compensate the rightful owner (Sect. 10, *post*); purchase from an owner already registered gets rid of this liability also.[31] What amounts to bonâ fide purchase, &c., is of course chiefly a question of fact, but what constitutes bonâ fides may be a question of law; "notice or knowledge or the means of knowledge" of the misdescription would usually have to be proved against him.[32] A person who purchases land by a description differing from that on the register is not necessarily a "purchaser for value" of the property described in the register.[33] And even if he be a purchaser for value bonâ fide he may still have to submit to his registration being corrected on the demand of the registry office; his title to the land itself would then not be conclusive, but the register would be so far conclusive in his favour as to give him a right to compensation.[34]

[27] *Overland* v. *Lenehan* (1901) 11 Q. L. J. 59; *Pleasance* v. *Allen* (1889) 15 V. L. R. 601. Sometimes the position of old landmarks has to be ascertained, as in *Turner* v. *Myerson* (1918) 18 S. R. (N. S. W.) 133. Area was preferred to boundaries in *Watcham* v. *Att.-Gen. of East Africa* [1919] A. C. 533.

[28] *Rourke* v. *Schweikert* (1888) 9 N. S. W. Eq. 152.

[29] *Hamilton* v. *Iredale* (1903) 3 S. R (N. S. W.) 535.

[30] *Hay* v. *Solling* (1895) 16 N. S. W. 60, 67; *Smith* v. *Registrar of Titles* (1910) Jamaica, unreported.

[31] See *Oelkers* v. *Merry* (1872) 2 Q. S. C. R. 193; *Main* v. *Robertson* (1886) 7 Aust. L. T. 127.

[32] *Hay* v. *Solling*, *supra*. In *Marsden* v. *McAlister* (1887, 8 N. S. W. 300) the registered owners were the trustees of a deceased owner and were not treated as purchasers.

[33] *Pleasance* v. *Allen* (1889) 15 V. L. R. 601.

[34] *Registrar of Titles* v. *Esperance Land Co.*, *supra*. This case perhaps applies also in Leeward Islands (*ante*, p. 130). As to claims for compensation, see sect. 10, *post*.

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Occasionally the description may be so vague that the property intended to be referred to is not identifiable; in such a case the register is of course not conclusive as evidence of the owner's title.[35]

Four jurisdictions—New South Wales, Queensland, Papua, Trinidad-Tobago [36]—have a provision peculiar to them with respect to mistakes consisting in double registration or misdescription of parcels. Under these circumstances the registered owner is entitled to be paid the value of any buildings, &c., that he may have erected on the land since the wrongful registration, and failing this payment the rightful owner cannot recover the land itself but only the value of the land without the buildings.

In Manitoba [37] no mention is made of omission or misdescription of easements, the two kinds of mistake mentioned being double registration and misdescription of parcels as in the eleven jurisdictions above dealt with. The relevant enactments are contained in one section only, instead of three, and the general enactment protecting purchasers from the consequences of mistake in their predecessors' registration is absent. The effect of the single section seems however (except as to easements) to be the same as that of the enactments in the other eleven jurisdictions.

The enactments in Saskatchewan, Alberta, and North-West Territories [38] agree with that of Manitoba in omitting the reference to easements; in other respects they follow those of the eleven jurisdictions above, with one important difference. No exception is made in these three jurisdictions for the case of a purchaser or mortgagee whose vendor or mortgagor has been registered with an erroneous description of the parcels, so that in Saskatchewan, Alberta, and North-West Territories the register is not under any circumstances conclusive as to parcels.[39]

The question of correcting obvious mistakes in the register, and calling upon persons interested to submit to more serious mistakes being put right, need not be referred to here at any length. The majority of the statutes confer ample powers of correction and

[35] *Rorison* v. *Kolosoff* (1910) 15 West. R. 497 (B. C.).

[36] N. S. W. 1900, s. 125; Q. 1861, s. 47; P. 1913, s. 145; Tr. 1902, s. 133. The Queensland cases of *Oelkers* v. *Merry* (*supra*) and *Merry* v. *Aust. Mut. Prov.* (1872, 3 Q. S. C. R. 40), decided before the Q. 1877, illustrate the hardship against which these enactments were intended to guard.

[37] M. 1913, s. 84.

[38] Sas. 1917, ss. 159, 174; Al. 1906, ss. 44, 104, 106; Can. 1906, ss. 142, 144, 174.

[39] An unreported Alberta case (*Hextall* v. *Burns*, 1911) is stated in Can. Torr. Syst. 197. And see *Burden* v. *North Alberta Registrar* and *Hansen* v. *Franz*, referred to in note 23, p. 133 *ante*.

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rectification on the registry officers and the courts,[40] though the machinery for effecting alterations in the register may differ in different jurisdictions.[41] Only in British Honduras are these powers left to be implied; but even there the implication that proper powers of the kind are available seems clear.[42] A few points from decided cases, supplementing the text-books cited, may be referred to. Mandamus will lie against the registrar to register an instrument or correct the register, but the court will not always interfere with the registrar's judicial discretion.[43] The ordinary power of the courts to rectify executed instruments extends to registered instruments such as a mortgage.[44] The precise method of enforcing hostile rights against a registered owner is not important, and either the register itself may be altered, or the owner may be declared a trustee for the person rightfully entitled.[45] The mere fact of the land being on the register with a fully warranted title will not prevent rectification against a wrong-doer "so long as the rights of third parties are not implicated,"[46] and à fortiori errors more or less obvious can be put right when they arise merely through some mistake. As against purchasers for value bonâ fide the right of the registry to insist on correcting a mistake appears to be stronger than that of a rightful owner.[47]

SECTION 8—FRAUD.

In England, Ontario, and Trinidad-Tobago, there is no general enactment making the register inconclusive for fraud, though in Trinidad-Tobago there are provisions as to fraud which suggest that the omission of the general enactment from the local statute is

[40] See Own. & Inc. 238, 255 *et seq.*; Aust. Torr. Syst. 842 *et seq.*; Can. Torr. Syst. 146, 199; N. Z. 1915, ss. 73-78, Hutch. 91-95; I. 1891, s. 34 (2). Two Irish cases are: *In re Leonard's Estate* and *In re Hussey's Estate* [1912] 1 I. R. 212, 473.

[41] *National Trustees Co.* v. *Hassett* [1907] V. L. R. 404, 422.

[42] See *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491. Against this there is an observation in *In re Walsh* [1916] 1 I. R. 40, regarding the necessity for express jurisdiction to correct mistakes in the register.

[43] *Perpetual Executors Assoc.* v. *Hosken* (1912) 14 C. L. R. 286; *Ex p. Gallagher* (1908) S. S. R. (N. S. W.) 230.

[44] *Cudmore* v. *Cudmore* [1892] S. A. R. 119.

[45] *Macdonald (John) & Co.* v. *Tew* (1914) 32 O. L. R. 262.

[46] *Loke Yew* v. *Port Swettenham Rubber Co.*, *supra*, at p. 504. The observations in this case have a special value when applied to the statutes of such jurisdictions as British Honduras (Uganda and Sudan being further instances), where express powers of correcting the register are not in terms conferred. See note 42.

[47] See *Registrar of Titles* v. *Esperance Land Co.* (1899) 1 W. A. R. 118.

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due to an oversight in drafting.[1] In England and Ontario fraudulent dispositions are made void, and the statutory powers of rectifying the register by necessary implication include cases of fraud.[2]

In the other nineteen jurisdictions fraud is one of the express exceptions which prevent the register being conclusive. In many of the statutes the jurisdiction of the courts with respect to fraud is also in terms preserved, but without any such express enactments the courts would seem to have ample power to deal with fraud. That a registration statute is not to be used for the perpetration of fraud is still an "inflexible rule."[3]

The scheme of the statutes as a whole (including England, Ontario, and Trinidad-Tobago) is to treat fraud as in general vitiating any registration, and supplement this by provisions making the register conclusive where the registered owner has not himself been concerned in the fraud. Except in some cases of initial registration, the registered owner must usually also be a purchaser for value. There are some further exceptions and modifications, but notwithstanding the difference in form between some of the enactments (for example those of England and New South Wales) the scheme is substantially the same in each of the twenty-two jurisdictions here treated of. Some of the enactments in which fraud is mentioned have already been cited and need not all be further referred to here, viz., those relating to notice (*ante*, p. 123, Sect. 6—"Notice").

In England and Ontario[4] it is clearly implied in the enactments that fraud is one of the grounds on which the register may be rectified. Dispositions which if unregistered would be fraudulent and void are to be so notwithstanding registration, and the register may be rectified accordingly, but these enactments only take effect subject to the enactment protecting "registered dispositions for valuable consideration" and subject to "estates and rights acquired by registration." It is also provided that in certain cases the register is to be rectified and compensation paid to the person removed from the register—that is, the register is not (in such cases)

[1] Tr. 1902, ss. 130, 132, 135. The words "except in case of fraud" are omitted from s. 47—the enactment corresponding with N. S. W. 1900, s. 42.

[2] Eng. 1875, ss. 95, 98, and 1897, s. 7 (1, 2); On. 1914, ss. 115, 121, 124 (7).

[3] *Hudson's Bay Co.* v. *Kearns* (1896) 4 B. C. R. 536; *Syndicat Lyonnais* v. *McGrade* (1905) 36 Can. S. C. R. 251. And see *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491. An American case affords a striking illustration, an initial registration being set aside for fraud under a statute which contained no exception for fraud: *Baart* v. *Martin* (1906) 116 Am. St. R. 394, 99 Minn. 197.

[4] Note 2, *supra*.

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literally conclusive as to title but only gives a right of indemnification. The cases referred to are two: (1) "Where a registered disposition would if unregistered be absolutely void"; (2) Where the effect of the wrongful registration "would be to deprive a person of land of which he is in possession or in receipt of the rents and profits."

Whether the expression "subject to estates or rights acquired by registration" includes the statutory estate conferred by initial registration, or only interests by way of transfer, &c., is not clear; if initial registration is not included, a first registered owner, though innocent of the fraud and possibly entitled to compensation for removal, could not (apart altogether from the two special cases last mentioned) rely on the register as being conclusive of his title.[5]

Ireland, Fiji, British Honduras, Leeward Islands, and Federated Malay States[6] are alike in the scantiness of the enactments mentioning fraud. In Ireland a single section enacts that the register is to be "conclusive evidence of the title of the owner," and the title is not "in the absence of actual fraud" to be affected by the owner having notice of anything relating to the land; but the court's jurisdiction is preserved over "actual fraud or mistake," and rectification of the register may be ordered "in such manner and on such terms as it thinks just." In Fiji and Federated Malay States only "purchasers" are mentioned as having a warranted title, and the title of the registered owner is "subject to challenge . . . on the ground of fraud or misrepresentation to which he is proved to be a party"; the jurisdiction of the courts over "actual fraud" is preserved. In British Honduras the register is evidence of title "to the exclusion of all other evidence (evidence of fraud only excepted)." In Leeward Islands the register can be "challenged . . . on the ground of fraud connected with" a registration. The intention of all five statutes seems to be that the register is only to be inconclusive for fraud of the owner for the time being, but this only appears clearly in Fiji and Federated Malay States enactments.

In British Columbia[7] fraud is only mentioned in connexion with the register of fully warranted title—"register of indefeasible fees," and this is "subject to the right of any person to shew fraud wherein the registered owner has participated in any

[5] See sect. 4—"Voluntary Transactions," and sect. 7—"Mistake," *ante* pp. 108, 131.

[6] I. 1891, s. 34 (1); Fi. 1876 (1906), ss. 14, 117; B. H. 1914, s. 30; L. Is. 1886 (1914), s. 8, sch. A "indefeasible;" F. M. S. 1911, ss. 8, 28, 88.

[7] B. C. 1911, ss. 22 (1), 25A, 124.

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degree." An action for recovery of land, of which the plaintiff has been deprived by fraud, may be brought

> as against the person registered as owner through fraud in which such owner has participated in any degree, or as against a person deriving his right or title otherwise than bonâ fide for value from or through a person so registered through fraud.

A registered owner who is a "purchaser or mortgagee bonâ fide for valuable consideration" is specially protected, and the register expressly made conclusive in his favour, notwithstanding he may have derived title from someone registered directly or indirectly through fraud or error.

In Manitoba [8] the conclusiveness of the register is subject to a right "to shew fraud," and an action for recovery of land lost through fraud may be brought, both enactments being nearly identical with those of British Columbia (*supra*). There is no general enactment specially protecting purchasers, as there is in British Columbia. There is however an enactment making notice immaterial, "except in the case of fraud on the part of such person," in the case of persons "contracting or dealing with" registered owners, and differentiating notice from fraud.[9]

In New South Wales, Tasmania, Victoria, Western Australia, New Zealand, and Jamaica,[10] the register is made conclusive "except in case of fraud," notice is made immaterial "except in case of fraud" as in Manitoba (*supra*), land lost through fraud may be recovered by action as in British Columbia and Manitoba (*supra*), and purchasers are specially protected notwithstanding the registration of a predecessor in title through fraud or error as in British Columbia (*supra*).

In Trinidad-Tobago [11] the same four enactments occur, but in the first (conclusiveness of register) the words excepting fraud are omitted.

In Queensland, South Australia, and Papua,[12] the four enactments are found as in New South Wales, &c. (*supra*), though the drafting and arrangement are different; in addition, the jurisdiction of the courts over fraud is expressly preserved. One South Australian enactment deserves particular attention, as stating in

[8] M. 1913, ss. 79, 84, 99.

[9] See sect. 6—"Notice," *ante* p. 123.

[10] N. S. W. 1900, ss. 42, 43, 124, 135; Tas. 1862, ss. 40, 114, 124, 126; V. 1915, ss. 72, 179, 244, 247; W. A. 1893, ss. 68, 134, 199, 202; N. Z. 1915, ss. 58, 59, 197, 198; J. 1888, ss. 55, 56, 135, 137.

[11] Tr. 1902, ss. 130, 132, 135. See *ante*, p. 136, and note 2.

[12] Q. 1861, ss. 44, 109, 123, 126, and 1877, s. 51; S. A. 1886, ss. 69, 186, 187, 207, 249; P. 1913, ss. 29, 30, 87, 144, 147.

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clear language what is in all jurisdictions meant by the "exception" of fraud: In the case of fraud

> Any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this Act: provided that nothing included in this sub-section shall affect the title of a registered proprietor who has taken bonâ fide for valuable consideration, or any person bonâ fide claiming through or under him.

In Alberta and North-West Territories there are the same four enactments, and also that preserving the jurisdiction of the courts over fraud; so in Saskatchewan, except the enactment specially protecting purchasers against fraud.[13]

In the enactments as to conclusiveness of the register the exception is of "fraud wherein the owner has participated or colluded," and in those as to notice (in Saskatchewan and North-West Territories) "fraud by such persons." There is also a difference in these three jurisdictions as to the effect of a misdescription of parcels through fraud or error, the register under such circumstances being in no case conclusive (*ante,* p. 135, Sect. 7—"Mistake").

The enactments that speak of fraud simply seem to bear the same construction as those that speak of fraud in which the registered owner is concerned.[14] The fraud that is here referred to as making the register inconclusive is the fraud of the owner, not the person from whom he may have derived title.[15] Other circumstances that may incidentally involve fraud are dealt with under the heads of Mistake (Sect. 7, *ante,* p. 129), Forgery (Sect. 9 *post*), and Liability to rightful owner (Sect. 10 *post*).

Many cases occur in which mere notice has been held fraud, but in most of these the person fixed with notice was not yet registered, and in others there was an element of dishonesty in disregarding the existence of an unregistered interest.[16]

In some cases notice that the interest in respect of which the owner subsequently became registered had been acquired by the fraud of its then owner has itself been treated as fraud,[17] and this seems right in principle.

[13] Al. 1906, ss. 42, 44, 104, 106, 135, 139; Can. 1906, ss. 4, 72, 142, 144, 167, 174; Sas. 1917, ss. 59, 159, 174, 194, 205 (omitting 1909, s. 138).

[14] On the general principle illustrated in *John* v. *Dodwell & Co.* [1918] A. C. 563, 574.

[15] *Cullen* v. *Thompson* (1879) 5 V. L. R. 147, 153; *West Australian Ice Co.* v. *Freeborn* (1904) 7 W. A. R. 22, 24; *Assets Co.* v. *Mere Roihi* [1905] A. C. 176, 210.

[16] See sect. 6—"Notice" *ante,* p. 127, notes 39-42.

[17] *Colonial Bank* v. *Pic* (1880) 6 V. L. R. 186; *Gilbert* v. *Bourne* (1895) 6 Q. L. J. 271; *Syndicat Lyonnais* v. *McGrade* (1905) 36 Can. S. C. R. 251; *Robinson* v. *Ford* (1914) 31 West. R. 13 (Sas.); *Shetler* v. *Foshay* (1915) 31 West. R. 181 (Sas.).

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It will be sufficient to make a principal's registration inconclusive that his agent has been guilty of fraud in acquiring the land.[18] Cases of this sort approximate to cases of voluntary assurances, as to which see Sect. 4—"Voluntary transactions" *ante*, p. 106.

The conduct that is to constitute fraud must be "actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud."[19] This really sums up the result of a large number of Australasian and Canadian cases to the same effect, and overrules others to the contrary.[20] The following passages on the Australian and English systems respectively have been judicially approved in Canada:

> There is a conflict of authority on the question whether it is "fraud" to acquire a registered title with the knowledge that an unregistered interest in the land will thereby be defeated. On the one hand, in New Zealand it has been held that this is fraud, in New South Wales and Victoria the contrary has been held. On principle, and by analogy to the general law, the view adopted in the New Zealand cases would seem to be the preferable one.[21]
>
> It is consistent both with good faith and the scheme of the system that other persons than the registered proprietor should be known to have interests in the land not appearing on the face of the register, and to effect registration with knowledge of the existence of such interests may be justifiable and proper. But to effect registration with knowledge that another person is also taking steps to effect registration in respect of the same property could hardly under any circumstances be otherwise than dishonest and fraudulent.[22]

In another Canadian case it is said, with reference to Aust. Torr. Syst. 835 *et seq.*:

> A very logical distinction is there suggested between mere knowledge of the existence of an unregistered interest, which may not necessarily be hurt by the transaction attacked, and knowledge that the effect of that transaction will be to injure or destroy that interest. The knowledge that such will be the effect is obviously something more than mere knowlege of the existence of that interest.[23]

[18] *Ex p. Batham* (1888) 6 N. Z. R. 342; *Eccles* v. *Hall* (1894) 13 N. Z. R. 433; *Carden* v. *Gillett*, *ib.* 457; *Assets Co.* v. *Mere Roihi* [1905] A. C. 176, 210; *Wolfson* v. *Oldfield* (1911) 18 West. R. 449 (Man.); *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491.

[19] *Assets Co.* v. *Mere Roihi*, *supra*. And see *Loke Yew* v. *Port Swettenham Rubber Co.*, *supra*; *Butler* v. *Fairclough* (1917) 23 C. L. R. 78.

[20] See Aust. Torr. Syst. 834-840; Can. Torr. Syst. 165-174.

[21] Aust. Torr. Syst. 836, quoted in *Independent Lumber Co.* v. *Gardiner* (1910) 13 West. R. 548 (Sas.), at p. 551.

[22] Own. & Inc. 151, quoted in *Independent Lumber Co.* v. *Gardiner*, *supra*, at p. 552, and in *Coventry* v. *Annable* (1911) 19 West. R. 400 (Sas.), at p. 416.

[23] *Sydie* v. *Saskatchewan and Battle River Co.* (1913) 25 West. R. 570 (Al.) at p. 591.

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The difficulty lies in the demarcation of the line between knowledge or notice that is not to be treated as fraud, and notice that under particular circumstances must be treated as fraud. The question has been dealt with *ante,* p. 128 (Sect. 6 — "Notice"), from the point of view of notice as not amounting to fraud, and the cases there cited are equally relevant to the other aspect of the question—what notice does constitute fraud.

There are of course numerous instances of conduct that amounts to fraud apart from any question of notice. On such questions there would appear to be no difference between the general law and the special statutory law relating to registration of title. Some of such instances may usefully be referred to. Thus, it is obviously fraud to obtain initial or other registration by personating the true owner, or making false declarations as to possession of the land or loss of documents, &c., filling up in an unauthorized manner a document signed in blank, obtaining the owner's signature to a document other than that intended by him to be signed.[24] It is fraud for an agent or trustee to deny the trust when he knows that the land has been registered in his own name but on behalf of his principal.[25] It is fraud for one who is agent for a purchaser to act as agent for the vendor without disclosing the true position.[26] It may also be fraud to procure registration by a *suppressio veri.*[27] Cases of duress and hard dealing with minors, married women, &c., may be supported as being fraudulent and so sufficient to make the registered title inconclusive between the parties to the transaction.[28]

Forgery of course necessarily implies fraud. Special considerations apply to forgery, which is the subject of the next Section (Sect. 9). Cases of forgery, however, strongly illustrate the conclusive effect of registration of a bonâ fide purchaser for value from a vendor whose registration has been procured by fraud; such a purchaser's title may be upheld even where his vendor (the previous registered owner) has been registered by means of his own for-

[24] *Fotheringham* v. *Archer* (1868) 5 W. W. & a'B. L. 95; *Brady* v. *Brady* (1874) 8 S. A. R. 219; *Cullen* v. *Thompson* (1879) 5 V. L. R. 147; *Anderson* v. *Davy* (1882) 1 N. Z. S. C. 302; *Ogle* v. *Acdy* (1887) 13 V. L. R. 461; *Gilbert* v. *Bourne* (1895) 6 Q. L. J. 271; *Tolley & Co.* v. *Byrne* (1902) 28 V. L. R. 95.

[25] *Kissick* v. *Black* (1892) 10 N. Z. R. 519; *Lake View* v. *Port Swettenham Rubber Co.* [1913] A. C. 491, 504; *In re Lang Estate* [1919] 1 W. W. R. 651 (Sas.).

[26] *Wolfson* v. *Oldfield* (1911) 18 West. R. 449 (Man.).

[27] *Saunders* v. *Cabot* (1885) 4 N. Z. C. A. 19; *Bell* v. *Beckman* (1889) 10 N. S. W. Eq. 251; *Fish* v. *Bryce* (1909) 10 West. R. 616 (Sas.).

[28] See *Kolp* v. *Hunter* (1911) 19 West. R. 709 (Sas.), observed upon in Can. Torr. Syst. 170.

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gery—that is, has been himself the forger and not merely the victim of another person's forgery.[29]

There may be a distinction between fraud for the purpose of initial registration—that is, before the land is actually on the register, and fraud in connexion with land after it has been registered; in the former case the statutory differentiation between notice and fraud might not apply.[30]

There may be less difficulty in setting aside a completed transaction than if the land were held under the ordinary law, and it has been said that something less than actual fraud may be sufficient in the case of registered land.[31]

SECTION 9—FORGED AND INVALID INSTRUMENTS.

Forgery may be a particular instance of fraud, and on that footing is referred to in the preceding Section (Sect. 8). But forgery has other results, independently of any want of bona fides in the person who takes under a forged instrument. From this point of view there is no distinction between instruments that are actual forgeries, and those that are invalid as not being what they purport to be with regard to the land concerned.[1]

Forgery is only referred to expressly in the statutes of two jurisdictions—Ireland and South Australia, the necessity for a "genuine" registrable instrument only in two—Fiji and Federated Malay States, and invalid execution of instruments only in one—South Australia. In Ireland [2] an owner or incumbrancer is entitled to indemnity for loss through entries on the register being obtained by "forgery or fraud, or" mistakes in the registry. In Fiji and Federated Malay States [3] the register is conclusive in favour of "any purchaser of land upon a *genuine* transfer or transmission by the registered proprietor thereof," which seems to exclude both forgery and other kinds of invalid execution,[4] as in South Australia.

[29] *Anderson* v. *Davy* (1882) 1 N. Z. S. C. 302; *Fawkes* v. *Att.-Gen.* (1903) 6 O. L. R. 490; *Fialowski* v *Fialowski* (1911) 19 West R. 644 (Al.); *Brown* v. *Broughton* (1915) 31 West. R. 583 (Man.). These cases illustrate the case put at p. 257 of *Gibbs* v. *Messer* [1891] A. C. 248.

[30] *Saunders* v. *Cabot* (1885) 4 N. Z. C. A. 19.

[31] *Anderson* v. *Morgan* [1917] 2 W. W. R. 969 (Al.).

[1] See *Messer* v. *Gibbs* (1887) 13 V. L. R. at p. 870.

[2] I. 1891, s. 93.

[3] Fi. 1876 (1906), s. 14; F. M. S. 1911, s. 8.

[4] See *Lim Pang Geok* v. *Sokalingam Chetty* (1907) Innes F. M. S. 90, 93, where stress is laid on the word "genuine." In *Gibbs* v. *Messer* [1891] A. C. 248, 258, the necessity for registration of a "genuine deed" is insisted on.

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In the South Australian statutes[5] forgery is kept distinct from fraud, but classed with other invalidities in the execution of instruments, and the register is made inconclusive

in the case of a certificate or other instrument of title obtained by forgery, or by means of an insufficient power of attorney, or from a person under some legal disability, in which case the certificate or other instrument of title shall be void: provided that the title of a registered proprietor who has taken bonâ fide for valuable consideration shall not be affected by reason that a certificate or other instrument of title was obtained by any person through whom he claims title from a person under disability, or by any of the means aforesaid.

With respect to the effect of forgery on the conclusiveness of the register, it will be found that in jurisdictions other than South Australia the law has been settled by the courts to the same effect as declared by the enactment above quoted, and it seems probable that this enactment lays down a rule, both as to forgery and as to other kinds of invalid execution, which will hold good in every other jurisdiction.

The question of forged documents as affecting the title of an applicant for initial registration hardly arises. Such a forgery is on the same footing as any other defect in the chain of title submitted for examination at the registry, and in the event of the forgery not being detected and the land being placed on the register, the registered owner's title to the land itself will not be assailable (in most jurisdictions and assuming his bona fides) merely by reason of the forgery;[6] in England, Ireland, and Ontario the case may be different. The registered owner may be liable to make pecuniary compensation to the true owner (Sect. 10, *post*), except possibly in the three jurisdictions just mentioned, but he can hold the land, and if he transfers to a purchaser the register will be conclusive in favour of the latter.[7]

The question of the effect of forgery is chiefly important in its relation to transactions subsequent to initial registration. Where the registered owner has himself forged the instrument on the faith of which registration has been effected, the case is one of fraud, and the forgery is only a circumstance. Other considerations apply where there is no fraud in the person taking the interest, but his vendor, mortgagor, &c., has given him an instrument purporting to be registrable which is forged or otherwise invalid. The rule as

[5] S. A. 1886, s. 69 (2).

[6] *Coleman* v. *Riria Puwhanga* (1886) 4 N. Z. S. C. 230. The position of a first registered owner with a defective title is referred to in sect. 4—"Voluntary Transactions," *ante* p. 109.

[7] See some of the cases in the notes next following.

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now enacted in South Australia had already been laid down by the courts in some jurisdictions, and since the date of the enactment quoted above has been confirmed (apart from that enactment) by the Privy Council.[8] This rule is, in effect, that a registration obtained by means of a forged or otherwise invalid instrument is not conclusive, but may become conclusive in favour of a purchaser who takes from the improperly registered owner and himself becomes the registered owner.[9] This conclusiveness may perhaps, in England and Ontario, take the shape of indemnity by money payment in lieu of a title to the land itself.[10]

In the South Australian enactment the registered "certificate or instrument of title" is said to be "void." But in the Privy Council judgment though the "forged transfer or mortgage" is referred to as "void" or "a null deed," it is said to be capable of becoming "the root of a valid title in a bonâ fide purchaser," and the "registered right of the transferee or mortgagee" is not treated as void, but only as not "indefeasible." This suggests that the registration of the person taking under the forged instrument is better described as "voidable," the register being inconclusive for the time being. It would seem that only in such circumstances as occurred in *Gibbs* v. *Messer*—where a merely fictitious name was placed on the register—could the registration, that is the register entry and the certificate of title, be properly described as "void" and incapable of becoming "the root of a valid title." The position of a person improperly placed on the register—even by means of an instrument forged by himself—seems to be closely analogous to that of one to whom the legal estate in unregistered land is actually conveyed by means of gross fraud; it would be possible for an innocent purchaser to get in such a legal estate and successfully hold it under the general law. Registration is, in a system of registration of title, to be regarded as the equivalent of getting in the legal estate in unregistered land, and instruments of transfer, mortgage, &c., are to be regarded as authorities directed to the custodian

[8] *Gibbs* v. *Messer* [1891] A. C. 248. Earlier cases to the same effect are: *Brady* v. *Brady* (1874) 8 S. A. R. 219; *Ex p. Davy* (1888) 6 N. Z. R. 760. A Victorian case to the contrary must be considered as overruled: *O'Connor* v. *O'Connor* (1887) 9 Aust. L. T. 117.

[9] *Katene Te Whakaruru* v. *Public Trustee* (1893) 12 N. Z. R. 651, 661; *Fawkes* v. *Att.-Gen.* (1903) 6 O. L. R. 490; *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47; *Lim Pang Geok* v. *Sokalingam Chetty* (1907) Innes F. M. S. 90. As to purchaser's title: *Bailey* v. *Cribb* (1884) 2 Q. L. J. 42; *Russell* v. *Registrar-General* (1906) 26 N. Z. R. 1223; *Fialowski* v. *Fialowski* (1911) 19 West. R. 644 (Al.); *Brown* v. *Broughton* (1914) 31 West. R. 583 (Man.).

[10] Eng. 1897, s. 7 (2); On. 1914, s. 124 (7); Own. & Inc. 262.

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of the register authorizing him to alter the register in terms of the authority produced.[11] This seems an additional reason for regarding the registration effected on the faith of a forged or invalid instrument as merely voidable and inconclusive, not void. A different view has been taken in New Zealand, the forged instrument and the registration effected on the faith of it being held bad for fraud on the part of the transferor, &c.—in cases where the transferee is innocent—and the title of any subsequent purchaser being held to depend on the doctrine of estoppel.[12] This does not seem to be either a necessary or satisfactory theory.

The invalidity constituted by execution of an instrument under "an insufficient power of attorney" seems only to be illustrated in one reported case, where the register was held to be conclusive, but this case must be considered as overruled by *Gibbs* v. *Messer,* since no purchaser had intervened.[13]

The execution of instruments by "a person under some legal disability" seems to refer to cases of personal disability, such as infancy or lunacy,[14] but not mere inability to deal with the property by reason of some statute or contract. It is the want of genuineness in the instrument and not the absence of right to deal with the property that makes the registration inconclusive even though the person registered on the faith of the instrument have no notice of the invalidity. Thus, a convict's transfer may be good, and the register conclusive in favour of a purchaser without notice.[15] And a transfer by a lessee in the face of a covenant not to assign might result in the registered transferee having a conclusive title.[16]

[11] *Bailey* v. *Cribb, supra; Macindoe* v. *Wehrle* (1913) 13 S. R. (N. S. W.) 500. In *Arnot* v. *Peterson* (1912) 21 West. R. 153 (Al.), a transfer is referred to as "a mere order to the registrar." And see sect. 7—"Unregistered Transactions" *ante*, p. 117. The principle is that stated with respect to a stock register in *Sheffield Corp.* v. *Barclay* [1905] A. C. 392, 403. As to the practical encroachments on this theory of executed instruments, see Aust. Torr. Syst. 902, 905.

[12] *Ex p. Davy* (1888) 6 N. Z. R. 760.

[13] *Magor* v. *Donald* (1887) 13 V. L. R. 255. This case is not on the same footing as *Coleman* v. *Riria Puwhanga* and *Fotheringham* v. *Archer* (*supra*); these were cases (in the latter as to the nominee) of initial registration on a bad title, and are consequently covered by *Assets Co.* v. *Mere Roihi* [1905] A. C. 176. As to the distinction between initial and subsequent registration, see also *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47, 75-77, 82. As to powers of attorney, see Aust. Torr. Syst. 913, 914; Own. & Inc. 184.

[14] See *Ex p. Cameron* (1894) 15 N. S. W. 139; *Ex p. Dettman* (1918) 1 S. S. R. (N.S.W.) 545.

[15] *Paddington* (*Borough*) v. *Marsh* (1893) 14 N. S. W. Eq. 296; *Barham* v. *Hoggins* (1909) 6 Tas. R. 6.

[16] *McEacharn* v. *Colton* [1902] A. C. 104.

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SECTION 10—LIABILITY TO RIGHTFUL OWNER FOR VALUE OF LAND.

In nineteen of the jurisdictions the registered owner, although he may be able to vouch his registered title as a conclusive answer to any claim by way of action to recover the land or interest in land which stands on the register as his, may nevertheless under some circumstances be compelled to pay to the claimant the money value of the property. This liability is not put forward in the statutes as a formal exception to the conclusiveness of the register, but it seems to constitute an exception substantially. The enactments relating to the liability for pecuniary compensation are grouped with the enactments relating to indemnity from State funds for loss of land through the conclusiveness of the register as against the rightful owner, and contemplate chiefly cases where the defendant in the action is not the registered owner at the time though responsible for the loss. The registered owner himself may however sometimes be liable when the land cannot be recovered from him, and his liability for damages or compensation is distinct from the liability of the registrar as representing State funds.

There are three jurisdictions in which no provision is made by the statutes for any compensation being recoverable from the person who has by mistake been placed on the register with a conclusive title: Fiji, British Honduras, Federated Malay States. It seems possible, however, that an action might lie for wrongful registration as a tort in these jurisdictions, notwithstanding the silence of the statutes.[1] These same three jurisdictions are also without any provision for payment of indemnity out of State funds to persons who suffer loss through the register being conclusive against them; and there appears to be no principle of law on which any compensation could be recovered, except as against an individual owner or official of the registry.[2]

In three of the nineteen jurisdictions in which damages or compensation are recoverable—England, Ireland, New Zealand[3]—the registered owner is only liable indirectly to make good any loss suffered through registration. The liability only arises when indemnity or compensation has been paid out of State funds to a person injured by loss of land, and the amount of such a payment may

[1] See Aust. Torr. Syst. 850, notes 75-77; *Cox* v. *Bourne* (1897) 8 Q. L. J. 66; *Ontario Industrial Co.* v. *Lindsay* (1884) 3 O. R. 66; *Green* v. *Ponton* (1885) 8 O. R. 475.

[2] In two of these jurisdictions—Fiji and Federated Malay States—the registry officers (as in other jurisdictions) are not individually liable for official acts done bonâ fide: Fi. 1876 (1906), s. 120; F. M. S. 1911, s. 89.

[3] Eng. 1897, s. 7 (6); I. 1891, s. 93 (5); N. Z. 1915, ss. 190-192, 198.

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be recovered by the registrar on behalf of the Crown from the person responsible for the loss. The exact scope of the liability of the registered owner depends therefore upon the right to indemnity or compensation which the statutes confer upon the owner who loses his property.

The measure of the amount recoverable would of course be the sum paid out for indemnity or compensation. In none of the three statutes is any time limit expressly set to the action by the registrar, though there is a time limit in England, Ireland and New Zealand for the proceedings to recover indemnity or compensation in the first instance.

Leeward Islands [4] differs from all other jurisdictions. The general rule is that the registered owner is only liable indirectly, as in England, Ireland, and New Zealand, and after damages have been recovered from the Crown for the wrongful registration: but if registration is effected with less than fully warranted title, or if such a registration is subsequently made fully warranted (or indefeasible), the registered owner " his executors and administrators shall be liable to pay compensation " to any person who " is deprived of any estate or right in, to, or over the land or any money charged on the land." No time limit is mentioned in either case. Where the liability is imposed directly on the registered owner the measure of compensation would be the value of the land or amount of loss suffered, as in other jurisdictions where a direct liability is provided for.

In the remaining sixteen jurisdictions—the seven Canadian, seven Australian, Trinidad-Tobago, Jamaica—the relevant enactments are fairly uniform, but contain some differences that must be pointed out. (The question of indirect liability after payment out of State funds is dealt with further on.) Queensland and Papua [5] stand together, and differ from the others in making damages recoverable from " the person who derived benefit from " the wrongful registration; in other jurisdictions the liability is placed on the person who is responsible for the wrongful registration being effected. In Papua there is no provision for initial registration by voluntary application, and only wrongful registration subsequent to initial registration is contemplated.

In nine jurisdictions—Alberta, North-West Territories, New South Wales, South Australia, Tasmania, Victoria, Western Aus-

[4] L. Is. 1886 (1914). ss. 19, 134.

[5] Q. 1861, ss. 21, 126, 127; P. 1913, ss. 147, 151, 152.

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tralia, Trinidad-Tobago, Jamaica [6]—it is specially enacted that the registered owner who may be liable for damages to the rightful owner is (except in cases of fraud or misdescription [7]) released from this liability on the land being transferred bonâ fide for value to another person; in other jurisdictions the transfer of the land seems to make no difference, and the transferor remains personally liable, if he were already liable. In Alberta and North-West Territories there is no mention of a time limit for these actions against an owner, though there is a limit for other actions. Another group of four—South Australia, Victoria, Western Australia, Jamaica—differs with respect to the measure of damages; the value of buildings, &c., erected subsequently to the plaintiff having lost his land is to be excluded from the amount of damages recoverable. This provision, however, seems to be implied in the statutes of other jurisdictions.

In British Columbia—and the enactments in Manitoba and Saskatchewan seem to have the same meaning [8]—the cause of action does not include, as in other jurisdictions, the mere registration of a person who is not the rightful owner, but the registration must have involved "fraud or misrepresentation" (in British Columbia), or "fraud or wrongful act" (in Manitoba and Saskatchewan). In these jurisdictions the person by means of whose fraud, &c., the wrongful registration was effected is the person liable in an action. In Manitoba and Saskatchewan the procedure is peculiar in that in every such action the registrar is a necessary defendant.

In Ontario [9] no time limit is set for the bringing of an action. The cause of action includes any initial registration of a person who is not the rightful owner, but other registrations only if effected "through fraud."

In all sixteen jurisdictions the defence of bonâ fide purchase for value from a predecessor in title registered wrongfully by any means is, either expressly or by necessary implication, as available in an action for damages or compensation as in an action for recovery of the land itself.[10] In Saskatchewan, Alberta, and North-West Territories, such a defence is no more available in one action

[6] Al. 1906, ss. 105, 106, 110, 111; Can. 1906, ss. 143, 144, 149-151; N. S. W. 1900, ss. 126, 130-132, 135; S. A. 1886, ss. 203, 204, 207, 209, 215-219; Tas. 1862, ss. 125, 126, 130, 132; V. 1915, ss. 240, 241, 246, 247, 256; W. A. 1893, ss. 195, 196, 201, 202, 211; Tr. 1902, ss. 134, 135, 139, 140; J. 1888, ss. 136, 137, 141, 142.

[7] A case turning on this exception is *Hassett* v. *Colonial Bank* (1881) 7 V. L. R. L. 380.

[8] B. C. 1911, ss. 123, 124, 130, 131; M. 1913, ss. 154, 158; Sas. 1917, ss. 160-162.

[9] On. 1914, s. 124.

[10] See sect. 7—"Mistake" *ante*, pp. 132, 135, and references in notes.

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than in the other where a mistake by way of misdescription of parcels has been made, the register being alike inconclusive in either case; the land itself being recoverable in these three jurisdictions, the action for damages is not required where misdescription has occurred.

In eight of the sixteen jurisdictions—New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Trinidad-Tobago, Jamaica—the further defence is available that the plaintiff had notice of the initial registration and omitted to protect himself by a caveat—just as in an action for recovery of the land itself; in South Australia this defence is available in all cases of loss of land, whether by initial registration or otherwise. There are enactments of a similar kind (covering all cases of loss), in Alberta and North-West Territories. In British Columbia, Manitoba, and Saskatchewan,[11] the corresponding enactments refer only to actions against the registrar.

Where a time limit is mentioned, the action must be brought within six years of the date of deprivation, with an allowance for disabilities, except in Manitoba and South Australia; in Manitoba the limit is ten years and a period for disabilities, in South Australia twenty years in all. In South Australia the time runs from the date of the cause of action accruing, though this is the same thing as the date of deprivation.[12]

In the statutes of these sixteen jurisdictions—Canada (7), Australia (7), Trinidad-Tobago, Jamaica—the above provisions are enacted as from the point of view of the person seeking a remedy for wrongful registration of another, and include in their scope not only registered owners for the time being, but others who are not then on the register. From this point of view these provisions may be very shortly summarized, subject to all differences mentioned, as follows: Where the rightful owner of an interest in land has been deprived of his property through fraud, wrongful registration of another person, or mistakes in the register, and cannot recover it in specie by reason of the conclusiveness of the register against him, the registered owner may be directly liable to the rightful owner in an action to recover the value of the property, unless he can shew either that he is a bonâ fide purchaser for value or that the plaintiff has knowingly neglected to protect himself by caveat; in some cases the registered owner may, after parting with the land and ceasing to be on the register, remain liable; the

[11] B. C. 1911, s. 134; M. 1913, s. 161; Sas. 1917, s. 169.

[12] See *Spencer* v. *Registrar of Titles* [1906] A. C. 503, 510. [1908] A. C. 235, 240; *Finucane* v. *Registrar of Titles* [1903] S. R. Q. 75, 95.

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action must usually be brought within six years of the cause of action accruing.

Most of the questions that might arise under these enactments in the sixteen jurisdictions are also capable of being raised under the enactments that deal with actions for damages or compensation against the registrar as representing State funds, and some have arisen in cases under the latter. Such cases relate to the cause of action, the measure of damages, and the time limit for the action. The principles on these points laid down in cases of actions against the registrar will be found applicable to actions brought against the registered owner by the rightful owner of the land or interest lost through the register being conclusive with respect to the land itself. There seem to be only four reported cases of an action against the registered owner for damages; in one the title of the defendant was upheld, and the action failed,[13] in one the claim as for wrongful registration was only an alternative claim introduced by amendment,[14] in two others the registrar was a co-defendant and the claim was substantially against State funds.[15] There is also one reported case where an action was brought against a person who had been registered as owner but had transferred to a purchaser; the case being one of misdescription, the defendant was held liable for the plaintiff's loss notwithstanding that the defendant was no longer on the register.[16]

In four jurisdictions—New South Wales, Queensland, Papua, Trinidad-Tobago [17]—the circumstance that buildings have been erected by a registered owner, against whom an action to recover the land is subsequently brought by the rightful owner, may result in the latter recovering merely the value of the land without the buildings and not the land itself. This is referred to in Sect. 7—"Mistake" *ante,* p. 135.

With respect to the liability of a registered owner to an action by the registrar to recover a sum of money paid out of State funds to a person who had been deprived of an interest in land, such actions must necessarily be rare, and there appears to be no reported case on the subject. The cause of action is of course the payment out of State funds by way of indemnity to the person injured by the wrongful registration, and the measure of damages is the

[13] *Heath* v. *Commercial Build. Co.* (1898) 19 N. S. W. 246.

[14] *Monaghan* v. *Gleeson* (1887) 13 V. L. R. 384.

[15] *Cox* v. *Bourne* (1897) 8 Q. L. J. 66; *Morris* v. *Bentley* (1895) 2 Terr. R. 253.

[16] *Hassett* v. *Colonial Bank* (1881) 7 V. L. R. 380.

[17] N. S. W. 1900, s. 125; Q. 1877, s. 47; P. 1913, s. 145; Tr. 1902, s. 133.

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amount so paid. In no jurisdiction of the sixteen do the statutes mention any time limit for the proceedings by the registrar. Apparently the ordinary limitation Acts would apply, the amount to be recovered being regarded as a debt due to the Crown, and one question would be whether the Crown is bound by those limitation Acts.

The subject of recovery of indemnity paid out of State funds from the person who has caused the loss is further referred to in Chap. X—"State indemnity for loss," *post*.

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CHAPTER V—EQUITABLE ESTATES AND INTERESTS.

SECTION 1—EQUITABLE INTERESTS GENERALLY.

For the most part the legal estate and legal interests have been replaced, under registration of title, by registered ownership and interests. As pointed out in Chap. IV *ante,* there are still some interests in registered land that are strictly legal and yet are not registered. But for the most part interests that are not registered are in the same relation to any conflicting registered interest as equitable interests under ordinary law are to legal interests. With a few exceptions, unregistered interests are treated as equitable interests, and usually called "equitable." The distinction between equitable interests in registered and in unregistered land is, that in the case of registered land they can be protected much more effectually than is always possible where the land is unregistered. This protection is brought about by the existence of the equitable interest being stated in some way on the face of the register. Such a statement, though it may be a substantive entry on the register, does not constitute the equitable interest a registered interest. In the absence of any such protection, equitable interests are more likely to be defeated than they would be under the ordinary law.

Notwithstanding the division of equitable interests into protected and unprotected, they still form a single class juridically. Registration of title has not changed the fundamental principles of the common law and equity with regard to rights of property, but merely the methods of evidencing and enforcing these rights.[1] The general rule as to all these equitable interests is that they are of the same value in themselves, and may be dealt with in the same way, as equitable interests in unregistered land.[2] The doctrine that "the right to call for a conveyance of the land is an equitable interest or equitable estate" applies, in fact, to registered

[1] The theoretical aspects of the changes made are dealt with in Aust. Torr. Syst. 765-778, and 778-804; Own. & Inc. 86-101. Some of the views expressed in those passages require modification in the light of more recent cases. On the whole these views have been approved as applicable in most of the Canadian jurisdictions: see *Williams* v. *Box* (1909) 13 West. R. 451 (Man.); *Smith* v. *National Trust Co.* (1912) 45 Can. S. C. R. 618; *Re Anderton* (1908) 8 West. R. 319 (Al.); *Thompson* v. *Yockney* (1912) 22 West. R. 863 (Man.).

[2] *Barry* v. *Heider* (1914) 19 C. L. R. 197; *Tietyens* v. *Cox* (1917) 17 S. R. (N. S. W.) 48; *Butler* v. *Fairclough* (1917) 23 C. L. R. 78.

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land as well as other land.[3] The right to call for a conveyance becomes a right to be registered in respect of a certain interest; in each case the right—to a conveyance or to registration—is only an actual right (as distinguished from a mere claim) if specific performance would be granted by a court of equity.[4] The right to registration as the statutory method of assurance may therefore be called an "equitable interest or equitable estate," since "that right according to accepted rules of equity is an estate or interest in the land."[5] But this general doctrine does not necessarily imply that an unregistered or equitable interest is of precisely the same value in all jurisdictions.

"Equitable estates and interests are rights in personam, but they have a misleading resemblance to rights in rem."[6] In the case of registered land the equitable estate is much less like a right in rem than under the ordinary law of unregistered land. Its real nature, as a right in personam, is more clearly seen in the case of registered land. When this is once recognized, there is less occasion to differentiate the equitable estate in registered land by calling it a "right" as distinguished from an "estate"; the tendency of the courts at present being against any such differentiation, an undue insistence on it is liable to introduce confusion.[7]

The equitable doctrines by means of which the equitable estate of ordinary law has principally been built up are Specific Performance and Injunction. These play an equally important part in connexion with registered land. The injunction is indeed even more important than in the case of other land,[8] and its principle has been extended by applying it to the system of caveats or cautions and other restrictive entries on the register.

That the fundamental principles of equity with respect to enforcing assurances of the legal ownership are not affected by registration of title, is shewn by the large number of cases in the courts in which trusts — and particularly resulting trusts — are

[3] *London and S. W. Ry.* v. *Gomm* (1882) 20 Ch. D. 562, 581; *Re Clagstone and Hammond* (1898) 28 O. R. 409.

[4] *Howard* v. *Miller* [1915] A. C. 318, 326.

[5] *Barry* v. *Heider, supra.* The view expressed in Aust. Torr. Syst. 784 must be corrected.

[6] Mait. Eq. 122; and see p. 112.

[7] The observations in Aust. Torr. Syst. 772, 784, require modification from this point of view, particularly having regard to the case of *Barry* v. *Heider, supra.* Mr. Niblack's criticism is also pertinent, when he says: "In practice an unregistered equitable right in the nature of an incumbrance on land is quite as dangerous and burdensome as an unregistered equitable estate in land"; Analysis of Torr Syst., p. 251. "Equitable owner" is mentioned in V. 1915, ss. 105-107.

[8] *McEacharn* v. *Colton* [1902] A. C. 104, 107; *Davis* v. *Wekey* (1877) 3 V. R. 1; *Clarke* v. *Roe* (1899) 1 W. A. R. 123, 128.

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enforced against registered owners of land, without any special reference to the fact of the land being on the register.[9] Parol evidence may be given of a trust.[10]

SECTION 2—TRUSTS, THEIR PROTECTION AND ENFORCEMENT.

The actual trusts referred to most prominently in the statutes are the two typical classes that are brought into existence (1) by way of gift or settlement, and (2) upon death or bankruptcy. These types of trust are expressly recognized by the registration statutes in the majority of jurisdictions, but the method of recognition is not uniform.

In British Honduras [1] the statute contains no express reference at all to trusts, though caveats are mentioned, and it is contemplated that all "equitable estates and interests" shall be protected by caveat.

In British Columbia and Leeward Islands [2] the references to trusts are few. Notification of the existence of a trust may be made on the face of the register, but not the particulars of the trust, these being contained in a separate instrument which (in Leeward Islands) may be registered in the deeds registry. No special reference to trusts as arising by settlement, bankruptcy, &c., is made in these statutes. In British Columbia, when the register itself shews the existence of a trust, the land cannot be dealt with otherwise than in accordance with the provisions of the trust instrument. In Leeward Islands a caveat would have to be placed on the register to prevent improper dealings with the land; the notification of the trust is made by adding to the names of the transferees the words "as trustees," either "with" or "without" "survivorship." In British Columbia "in trust" or "upon condition," &c., may be placed on the register; if "joint owners" is the expression used, and the trust instrument provides for no transaction being carried out by less than a certain number of the owners, this has the effect of a "no survivorship" entry.

In Ireland [3] also the references to trusts are few. A registered owner may hold the land as trustee. A "trust for securing money" may be registered as a burden on the land. Notice of trusts is not to be entered on the register, but provision is made for the entry of cautions and inhibitions as restraints on alienation in the case of settled land and otherwise, and the names of the trustees of the

[9] Illustrations are: *Payne* v. *McDonald* (1908) 6 C. L. R. 208; *Perpetual Executors Assoc.* v. *Wright* (1917) 23 C. L. R. 185.

[10] *Cadd* v. *Cadd* (1909) 9 C. L. R. 171; *In re Lang Estate* [1919] 1 W. W. R. 651 (Sas.).

[1] B. H. 1914, s. 40, sch. D.

[2] B. C. 1911, ss. 50, 56, 57, 62, and 1915, s. 10; L. Is. 1886 (1914), s. 26.

[3] I. 1891, ss. 30, 45, 63, 64, 69-71.

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settlement may in the case of settled land be entered separately on the register. When two or more persons are registered as owners, an entry may be made to the effect that on the number being reduced no registered disposition may be made except under order of court—the "no survivorship" entry.

England and Ontario [4] stand together, the chief difference being that the Ontario statute has no special concern with settled land, whilst in England (1897, s. 6) express provision is made for the initial registration of settled land; the registered owner can deal with purchasers without the latter being hampered by notice of the trusts of the settlement, which may be filed for reference. On initial registration the owner may be a person "not entitled for his own benefit." Persons registered in place of deceased or (in England) bankrupt owners hold the land subject to the beneficial rights of others, but have the rights of beneficial owners for the purpose of dealing with the land; bankruptcy and insolvency are not mentioned in the Ontario statutes.[5] In Ontario notice of trusts is not to be placed on the register, and in England reference to trusts is to be excluded as far as possible. The Trustee Acts apply to registered land. Without expressly referring to trusts the enactments providing for cautions, inhibitions, and restrictions necessarily imply that these can be used for the protection of trusts.[6] Upon the registration of two or more persons as owners, entries may be made preventing any disposition by less than a certain number [7]—the "no survivorship" entry.

Five of the Australian jurisdictions may be taken together—New South Wales, South Australia, Tasmania, Victoria, Western Australia.[8] The references to trusts are much more numerous than in the jurisdictions previously noticed. The enactments are all substantially to the same effect, the chief differences being these: In Victoria and Western Australia the word "trustee" is less frequently used: in South Australia the registered title is always sub-

[4] Eng. 1875, ss. 7, 46, 83; 1897, ss. 6, 14. On. 1914, ss. 10, 18, 59, 95, 97, 100. Settlements, death, and bankruptcy are also referred to in Eng. 1903-8 Rules.

[5] Transfer to creditors' assignee is the subject of a rule: On. 1911 Rules, r. 38.

[6] Eng. 1875, ss. 49, 53-59; 1903-8 Rules, rr. 226-242. On. 1914, ss. 68, 72-79. See Own. & Inc. 110, 111, 140, 141.

[7] Eng. 1875, s. 83 (am.); 1903-8 Rules, rr. 224, 225. On. 1914, s. 97.

[8] N. S. W. 1900, ss. 43, 52, 72, 82-87, 95-97, 133; S. A. 1886, ss. 71, 72, 161-169, 180, 184-187, 191, 211; Tas. 1862, ss. 64, 66-69, 81, 82, 112-114, 133, and 1886, s. 3; V. 1915, ss. 17, 55, 56, 64, 122, 179, 183, 227, 241, 265, 270, 275; W. A. 1893, ss. 55, 61, 83, 134, 137, 182, 196, 220, 229, 234. Some points of difference with respect to caveats in these enactments are referred to further on.

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ject to "the rights of a cestui que trust, where the registered proprietor is a trustee, whether the trust shall be express, implied, or constructive," except "against the title of a registered proprietor taking bonâ fide for valuable consideration" (s. 71). The principal provisions are to the following effect: Purchasers are not affected merely by notice of a trust being in existence; caveat may be entered when land is transferred to be held by the transferee as a trustee; notice of a trust is not (as a rule [9]) to be entered on the register, but the trust instrument may be filed and protected by caveat—in New South Wales the entry of an official caveat being compulsory when such a trust instrument is filed; a trustee registered as owner must allow his name to be used in legal proceedings by the beneficiary; representatives of deceased or bankrupt owners hold the land on trust for those beneficially entitled, but otherwise are deemed to be beneficial owners; though a mortgage debt is made transferable at law, any trusts upon which it is held will be enforced; no indemnity from State funds is payable to beneficiaries for loss through breach of trust by a registered owner. When registered co-owners are entitled jointly, the "no survivorship" entry is made; this entry is usually sufficient indication of the existence of a trust, even though (as in Victoria and Western Australia) the statutory direction for its being placed on the register does not use the words "trust" or "trustee." [10] In Tasmania the registrar may be nominated as one of the trustees to whom land is transferred (s. 66).

Queensland and Papua [11] differ in one respect from the other five Australian jurisdictions, whilst otherwise in substantial agreement with them. Land may be transferred to trustees "as trustees," and the trusts at the same time declared, by an instrument of transfer in statutory form—called a "nomination of trustees"—which is registered.[12] The trusts thus in one sense plainly appear on the face of the register. The trusts may however be declared by a separate instrument.[13] Land might also, apparently, be vested in and held by trustees as in other jurisdictions, without using the

[9] The principal exception seems to be in the case of trusts expressly stated in the body of a grant from the Crown: see *In re Edwards* (1908) 10 W. A. R. 144, under W. A. 1893, s. 55.

[10] *In re Tararua Club* (1908) 27 N. Z. R. 928. This applies equally in other Australasian jurisdictions. All the statutes that recognize trusts, except that of Manitoba, provide for "no survivorship" entry.

[11] Q. 1861, ss. 42, 66, 77-81, 83, 84, 86, 89; P. 1913, ss. 38, 63, 69, 84-86, 88-93, 100, 141 (3).

[12] See Aust. Torr. Syst. 975, as to the construction of the statutory "nomination of trustees."

[13] An illustration is *Commr. of Stamps* v. *Wienholt* (1915) 20 C. L. R. 531.

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words "as trustees," and either with or without a "no survivorship" entry.[14]

New Zealand[15] does not differ materially from the five Australian jurisdictions above mentioned, though the use of the word "trustee" is avoided somewhat, as in Victoria and Western Australia, even in connexion with the "no survivorship" entry.[16] The Trustee Acts are not mentioned, but are sufficiently indicated by the reference to vesting orders in s. 92 of the present statute. The registrar may be nominated as one of the trustees to whom land is transferred (s. 135).

In Fiji[17] no provision is made for indemnity out of State funds, and there is therefore no reference to beneficiaries' loss through breach of trust by a registered owner. There is also no express reference to purchasers not being affected by notice of a trust.[18] Transfer to trustees is protected by the words "as trustees" being placed on the register, either with or without the entry of a caveat. The Trustee Acts are not mentioned, but by s. 92 the Court has the power of making vesting orders. In other respects the provisions relating to trusts accord with those in the five Australian jurisdictions (New South Wales, &c.) above mentioned, and in particular the "no survivorship" entry is provided for.

The Federated Malay States[19] statutes, being originally taken from that of Fiji, agree for the most part almost word for word with the latter, including provision for the "no survivorship" entry. The only material difference as to trusts is the omission of all reference to bankruptcy. Where Fi. 1876, s. 89, has "deceased person or bankrupt," &c., F. M. S. 1911, s. 67, refers to deceased persons only. The result is that in the Federated Malay States the registration statute does not provide for the representative of a bankrupt registered owner holding the land subject to any trusts

[14] The power to deal with the land as beneficial owners has, with regard to public lands in Queensland, been overridden by a later statute: *Down* v. *Att.-Gen.* (1905), 2 C. L. R. 639, 647.

[15] N. Z. 1915, ss. 90, 92, 124, 125, 130-136, 146, 154, 193, 197. The difference between New Zealand and the Australian jurisdictions, referred to in Aust. Torr. Syst. 993, has been removed by the enactment now contained in s. 124 (2) of the present statute, under which the representatives of deceased or bankrupt owners hold subject to equities as in most other jurisdictions.

[16] *In re Tararua Club, supra*, note 10.

[17] Fi. 1876 (1906), ss. 20-23, 26, 48, 83, 89, 92, 93, 115.

[18] Fi. 1876 (1906), s. 14, is the enactment answering to N. S. W. 1900, s. 42, &c. Notwithstanding the difference in language, the two enactments probably have the same general scope: see (under the corresponding Malay States section, F. M. S. 1911, s. 8) *Chang Lin* v. *Chong Swee Sang* (1908) Innes F. M. S. 95.

[19] F. M. S. 1911, ss. 10-12, 14, 35, 65, 67, 69, 70, 86. See preceding note.

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to which it was previously subject, and it has been held that such a trust cannot always be enforced against the receiver, when registered as owner in place of an insolvent debtor.[20]

Trinidad-Tobago and Jamaica[21] follow substantially the five Australian jurisdictions (New South Wales, &c.) above mentioned, including the provision for a "no survivorship" entry. In Trinidad-Tobago the collateral trust instrument may be registered in the deeds registry. The Jamaica statutes do not use the word "trustee" in connexion with "no survivorship," but the entry is held, as in New Zealand, to indicate the existence of a trust.[22]

Saskatchewan, Alberta, and North-West Territories[23] stand together, but differ among themselves with respect to creditors' assignments, the provision for registering a creditors' assignee as owner being absent from the Canada statute, though appearing in the other two. Otherwise these three jurisdictions resemble generally the five Australian (New South Wales, &c.), including provision for a "no survivorship" entry, but with the following differences: Trustee Acts and vesting orders are not referred to, and the prohibition against entry of trusts on the register is more absolute; no provision is made for filing a collateral trust instrument upon land being transferred to persons who are to hold it as trustees; the registration of a creditors' assignee (in Saskatchewan and Alberta), which answers to transmission on bankruptcy in non-Canadian jurisdictions, is not qualified by any express provision for protection of equities, though this seems to be sufficiently implied in Alberta. Every registration is, however, subject to any registered "decrees, orders, or executions" affecting the owner of the land, and the courts have full control over the register for the purposes of rectification;[24] the silence with respect to vesting orders, &c., is not therefore of great moment. The absence of provisions for filing trust instruments, and for making a creditors' assignee hold subject to equities to which the land was previously subject, points to a settled policy of paying less regard

[20] *Chan Gun Lai* v. *Anderson Pole* (1911) Innes F. M. S. 126. In that case Aust. Torr. Syst. 993. was referred to with regard to New Zealand law, but this has now been amended as stated—note 13 *ante*, p. 158.

[21] Tr. 1902, ss. 61, 96, 101, 110-116, 130, 132, 141; J. 1888, ss. 42, 45, 51, 56, 64, 103, 107, 108, 113, 143.

[22] *De Cordova* v. *Registrar of Titles* (1910) Jamaica, unreported. See note 10 *ante*, p. 157.

[23] Sas. 1917, ss. 62, 124, 128, 146, 147, 170, 173, 194, 195; Al. 1906, ss. 47, 68, 76, 83A, 84, 121, 132, 135, 137; Can. 1906, ss. 75, 107, 121, 131, 161, 167, 168-173.

[24] Sas. 1917, ss. 60 (*e*), 73; Al. 1906, ss. 43 (*e*), 116; Can. 1906, ss. 73 (*e*), 156.

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to the purely English law of trusts than in most other jurisdictions. Such a case as occurred in the Federated Malay States might arise in these jurisdictions [25] (perhaps hardly in Alberta), though it is unlikely that the Malay case would be held applicable. In Alberta also the effect of entering a caveat is made equivalent (so far as priorities are concerned) to actual registration of an instrument.[26]

Manitoba [27] has some enactments not to be found in other jurisdictions, and is without others that are to be found in nearly every other jurisdiction. The provisions relating to purchasers not being affected by notice of trusts, trusts of assigned mortgage debts, protection of unregistered interests by caveat, no compensation being payable for loss by breach of trust, and use of trustees' names by beneficiaries—these are substantially the same as in the five typical Australian jurisdictions (New South Wales, &c., *ante*, p. 156). With regard to creditors' assignments there is an enactment similar to that of Alberta; the effect of a caveat is also similar to its effect in Alberta. Every registration is subject to registered judgments, orders, lis pendens, caveats, &c. The prohibition against the entry of trusts in general on the register is even more absolute than in Saskatchewan and Alberta, but exceptional provision is made for the case of "an executor or administrator or trustee under a will"; the will is to "be deemed to be embodied in" the register, and such an executor, administrator, or trustee can only deal with the land in accordance with the trusts upon which it is held. On the other hand no provision is made for a "no survivorship" entry, nor is transfer to joint owners mentioned in the statutes.

It appears then that in all twenty-two jurisdictions, except British Honduras, trusts of registered land are more or less explicitly recognized, and in all except British Honduras and Manitoba provision is made for a "no survivorship" entry being made on the register when land is transferred to joint owners. Manitoba goes further than other jurisdictions in formally recognizing and protecting trusts. In those jurisdictions in which this recognition is least formal and explicit the New Zealand and Jamaica decisions [28] will be applicable—to the effect that the "no survivorship" entry itself indicates the existence of a trust.

[25] *Chan Gun Lai* v. *Anderson Pole*, *supra*, note 20, *ante*, p. 159.

[26] M. 1906, s. 97. So in Manitoba (M. 1913, s. 151). This will be referred to later on.

[27] M. 1913, ss. 76, 78, 99, 100, 111, 129, 138, 151, 159, 167.

[28] *In re Tararua Club* (1908) 27 N. Z. R. 928; *De Cordova* v. *Registrar of Titles* (1910) Jamaica, unreported.

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The prohibition against notice of trusts being placed on the register means no more than that particulars of a trust are not to be the subject of a formal entry.[29] But if, as may sometimes happen, the particulars of a trust do formally appear as part of the title of the registered owner, the trust is as effectually warranted as the rest of the registered title. Thus, the purchaser of a registered owner's interest, where the whole beneficial interest is disclosed on the register as being in another person, takes nothing.[30]

The protective entries referred to operate in two ways—by way of notice, and as a restraint on the registered owner's powers of alienation. Such entries as caveats, cautions, inhibitions, and restrictions, operate directly as a kind of statutory injunction,[31] but they also serve to give notice to anyone searching the register. Other entries may also have the effect of preventing alienation, but they usually operate as restraints on alienation in an indirect manner, and sometimes simply serve as notice to persons proposing to deal with the owner of the land.

The entries consisting of the words "in trust," "upon condition," &c., in British Columbia,[32] and the describing a registered owner as executor, administrator, or trustee of a will, in Manitoba,[33] have precisely the same statutory effect as a caveat or inhibition forbidding alienation, since any dealing with the land inconsistent with the provisions of the trust, &c., is not then allowed to be registered. The deposit of the trust instrument for reference in New South Wales [34] may also be said to have the same effect as a caveat, since it is made compulsory on the registrar to "forthwith enter a caveat forbidding the registration of any instrument" inconsistent with the trusts declared by the trust instrument. The appointment of the registrar as one of the trustees (in Tasmania and New Zealand)[35] places on him precisely the same obligation as he would have, were a caveat entered, of seeing that no alienation inconsistent with the trust was registered.

[29] Aust. Torr. Syst. 973. This passage has been approved in Jamaica: *De Cordova* v. *Registrar of Titles, supra.* Australian decisions to the same effect are: *Ex p. Campbell* (1888) 9 Aust. L. T. (V.) 183), and *Ex p. Saunders* (1900) 21 N. S. W. 291.

[30] *In re Edwards* (1908) 10 W. A. R. 144.

[31] Aust. Torr. Syst. 802, 886, 1035, 1036, 1039; Own. & Inc. 131, 140, 141; Can. Torr. Syst. 374, 388, 390 (where the difference between the Australian and the Canadian caveat is pointed out); *Barry* v. *Heider* (1914) 19 C. L. R. 197, 212; *Pearson* v. *O'Brien* (1912) 20 West. R. 510, 527, 528 (Man.); *In re Registration of Caveat* (1908) Innes F. M. S. 114.

[32] B. C. 1911, s. 50.

[33] M. 1913, s. 76.

[34] N. S. W. 1900, s. 82.

[35] Tas. 1862, s. 67; N. Z. 1915, s. 135.

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In five jurisdictions—Queensland, Papua, Fiji, Federated Malay States, Leeward Islands [36]—the statutes authorize the addition on the register of the words "as trustees" after the name of the person to whom land is transferred in trust. No statutory effect is however given to these additional words, and strictly speaking they only operate as notice to persons dealing with the registered owners. Practically, a wider operation is given to such an entry, for the property is in this way earmarked as property which cannot be touched by the creditors of the individual registered owners. In Victoria the registrar has been held justified in refusing to register an execution against land of which the debtor was registered owner—as "executor;" in Saskatchewan a mortgage by an owner registered "as administrator"[37] may be unregistrable. This principle may well be applied generally. If the result is that improper dealing is prevented by refusal of registration, the entry would have the effect of a caveat or inhibition.

In Ireland,[38] the entry of the trustees' names on the register, in the case of settled land, has no statutory effect, and it is expressly provided that references to the settlement are not to affect anyone with notice of the trusts.

The "no survivorship" entry is the most usual method of shewing that the land is the subject of trust ownership. But no statutory operation is given to the entry so long as the registered owners remain physically competent to deal with the land and no individual owner releases his joint interest. The entry in fact operates merely as notice of the existence of a trust, and not as a restraint on alienation by all the joint owners. For this reason the entry is sometimes supplemented by an entry such as a caveat or inhibition, by which alienation is actually restrained. But only in seven jurisdictions is the settlor himself given express power to enter a caveat, &c., on transferring land to trustees, viz.: New South Wales, South Australia, Tasmania, New Zealand, Fiji, Federated Malay States, Trinidad-Tobago.[39] In other jurisdictions the onus of having such an entry made is thrown on the beneficiar-

[36] Q. 1861, s. 77, sch. I.; P. 1913, s. 84, sch. 9; Fi. 1876 (1906), s. 20; F. M. S. 1911, s. 10; L. Is. 1886 (1914), s. 26.

[37] *Balding* v. *Nicholas* (1893) 19 V. L. R. 110; *Western Trust Co.* v. *Olson* [1918] 3 W. W. R. 811, under Sas. 1917, s. 144. In a South Australian case the words "as administrator" appeared on the register: *Public Trustee* v. *Arthur* (1892) 25 S. A. R. 59. The distinction between a trust and a beneficial interest was recognized in *Re Robinson* (1874) 4 Q. S. C. R. 68.

[38] I. 1891. s. 71.

[39] N. S. W. 1900, s. 72; S. A. 1886, s. 191; Tas. 1862, s. 82; N. Z. 1915, s. 146; Fi. 1876 (1906), s. 22; F. M. S. 1911, s. 12; Tr. 1902, s. 116.

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ies or the registry itself. In England, Ireland, and Ontario,[40] "any person interested" may apply for an inhibition. In Victoria, Western Australia, and Jamaica[41] the registrar "may protect in any way he may deem advisable" the rights of the beneficiaries.

There is no uniformity in the treatment of the instrument declaring the trusts. In six jurisdictions—Ireland, Ontario, Manitoba, Saskatchewan, Alberta, North-West Territories—no provision is made for filing even a copy of the trust instrument for reference. On the other hand, in British Columbia[42] the trust instrument itself is registered, though separately. In Trinidad-Tobago and Leeward Islands[43] the trust instrument may be registered at the deeds registry, and in Trinidad-Tobago may include unregistered land. In Fiji and Federated Malay States[44] the trust instrument or a copy must be filed. In South Australia[45] it may be filed for reference, or it may be deposited at the deeds registry—though neither course is compulsory—and may include unregistered land. In Queensland and Papua[46] the trusts may either be set out in a schedule to the statutory transfer (or "nomination of trustees"), which is necessarily registered, or they may be contained in a separate instrument; in that case the trust instrument (which may include unregistered land), or a duplicate or attested copy, must be filed for reference.[47] In the remaining seven jurisdictions—England, New South Wales, Tasmania, Victoria, Western Australia, New Zealand, Jamaica[48]—the trust instrument or a copy may be filed for reference. In New South Wales and Tasmania unregistered land may be included in the trust instrument.

The trust instrument occupies a peculiar position in the system of registration of title, and this position is substantially the same in all jurisdictions, notwithstanding the differences in the statutes. The title of the beneficiaries, though equitable, is complete, and will be duly enforced by the courts like any other equitable title—it is not a merely incomplete legal title;[49] the beneficiaries do not seek a registered or legal title at all, but rest on their trustees' reg-

[40] Eng. 1875, s. 57; I. 1891, s. 70; On. 1914, s. 78.
[41] V. 1915, s. 66; W. A. 1893, s. 55; J. 1888, s. 45.
[42] B. C. 1911, s. 50.
[43] Tr. 1902, s. 110; L. Is. 1886 (1914), s. 26.
[44] Fi. 1876 (1906), s. 20; F. M. S. 1911, s. 10.
[45] S. A. 1886, s. 162.
[46] Q. 1861, ss. 77, 78; P. 1913, ss. 84, 85.
[47] An attested copy was deposited in *Commr. of Stamps* v. *Wienholt* (1915) 20 C. L. R. 531, and thereby escaped payment of stamp duty.
[48] Eng. 1897, s. 6 (6); N. S. W. 1900, s. 82; Tas. 1862, s. 66; V. 1915, s. 55; W. A. 1893, s. 55; N. Z. 1915, s. 130; J. 1888, s. 45.
[49] Anst. Torr. Syst. 792-795.

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istered ownership and the protection afforded by entries on the register that indicate the existence of the trust. The trust instrument is to be construed, and the beneficiaries' interests are to be dealt with, as though the property were unregistered land. Thus, interpretation clauses in the registration statutes making words of limitation unnecessary for the creation of estates of inheritance will not be read into the trust instrument.[50] And interests, which in the case of unregistered land would be estates tail, must be assured and barred by the methods of conveyance appropriate to estates tail under the general law.[51] The beneficiaries have the same right to dispose of their interests as if they were ordinary equitable interests in unregistered land, and in case of competing priorities the ordinary rules will apply.[52]

SECTION 3—EQUITABLE INTERESTS OTHER THAN TRUSTS.

By equitable interests here are meant primarily interests created after initial registration, or recognized as such after initial registration, excluding such equitable interests as merely give rise to claims for compensation by being lost on initial registration.[1] Interests by way of mortgage are only referred to incidentally, and are excluded as much as possible. "Mortgages" is the subject of the next Chapter (Chap. VI.).

Equitable interests may vary in value as rights of property from a mere claim to have an interest, registered or unregistered, in the land,[2] to the right under a duly executed instrument of being registered as owner of a particular interest.[3] Between these two extremes lie such interests as leases (in England and Ontario [4]), which can be protected by the registration of a formal "notice." The right which the holder of a duly executed statutory instrument has to be forthwith placed upon the register—as for instance a purchaser who has paid the whole of his purchase money—amounts to a right of property as distinguished from a mere claim to specific performance.[5]

[50] *Walters* v. *Eldridge* (1892) 4 Q. L. J. 118; *Hayes* v. *Bourne* (1895) 7 Q. L. J. 146.

[51] *Allison* v. *Petty* (1899) 9 Q. L. J. 125; *Tietyens* v. *Cox* (1916) 17 S. R. (N. S. W.) 48.

[52] *In re Rutter* (1888) 3 Q. L. J. 105.

[1] As in cases like *Williams* v. *Papworth* [1900] A. C. 563, referred to in Aust. Torr. Syst. 863.

[2] *McEllister* v. *Biggs* (1883) 8 A. C. 314.

[3] *Barry* v. *Heider* (1914) 19 C. L. R. 197.

[4] Eng. 1875, ss. 50-52; On. 1914, ss. 70, 71. See Own. & Inc. 125-147.

[5] *Barry* v. *Heider*, *supra*. A similar case is *Acme Co.* v. *Huxley* (1912) 20 West. R. 133 (Al.).

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Registration being the equivalent of getting in the legal estate under the general law,[6] and a duly executed statutory instrument being the best authority for the register to be altered in favour of the person presenting it, such an instrument confers the highest form of interest short of registration—the legal interest. An instrument in any other form would of course, if registrable, confer an equitable interest of equal value. As a rule, however, only instruments in statutory form and duly executed can be registered; the use of the word "may" in such phrases as "may transfer," "may lease," &c., is not merely permissive, where no alternative method of dealing with the land is referred to.[7] To this rule British Columbia and British Honduras[8] are exceptions; in the former the statutory form (when prescribed) is optional, though documents in order to be registrable must be attested, and in the latter no special forms are prescribed. In other jurisdictions substantial compliance with prescribed forms is required, though much discretion is left to the registry officers. In South Australia, Papua, and Manitoba,[9] under unusual circumstances instruments not in statutory form are expressly authorized to be accepted for registration, and in other jurisdictions probably a similar practice would be upheld as reasonable.[10] But the grantee under a deed, which by its form and contents is clearly applicable only to land that is not on the register, cannot claim as a matter of right to have it registered; such a document differs in substance from the prescribed forms.[11] This doctrine is of course peculiarly applicable to the case of leases and mortgages, but not so strongly to the case of a conveyance out and out.

In the scale of equitable interests, therefore, such an instrument as a contract for sale, a formal (but unregistrable) deed, or a statutory instrument not duly attested, represents an interest of less value than an instrument which is registrable forthwith on being presented at the registry. Such interests as leases in England and Ontario, for which protection by registered "notice" is pro-

[6] Aust. Torr. Syst. 767, 842.

[7] *Crowley* v. *Templeton* (1914) 17 C. L. R. 457.

[8] B. C. 1911, ss. 51, 102, 106; B. H. 1914, s. 31.

[9] S. A. 1886, s. 247; P. 1913, s. 126 B; M. 1913, s. 91.

[10] In Victoria an ordinary conveyance has been accepted: Guest, T. of L. Act. 223, referred to in Aust. Torr. Syst. 905. In *Lake Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491, an instrument in non-statutory form was treated as registrable.

[11] *Crowley* v. *Templeton*, *supra* (lease under seal, purporting to be made under the enactment corresponding with the (English) Leases Act 1845). This was an appeal from Victoria: in a similar case in Manitoba the Court was divided as to the registrability of such a lease: *Shore* v. *Green* (1890) 6 Man. R. 322.

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vided (*ante*, p. 164), must be regarded as equitable interests in relation to the registered ownership; they are superior to mere contracts for sale as being complete, but inferior to a statutory instrument ripe for registration — since this merely requires an additional formality in order to confer a registered and legal interest.[12] Other interests which must be regarded as equitable and not susceptible of actual registration, are life estates, reversions, and remainders, in jurisdictions where these can only be noted on the register—as distinguished from being formally registered.[13] But when statutory provision is made for entering such interests as these on the register (though without actual registration) in lieu of merely protecting them by caveat, caution, &c., they may be regarded as incumbrances on the registered ownership as well as equitable interests of ownership.

An equitable interest may be derived either from a registered owner, or from a person who is not registered. A contract of sale is the commonest instance of an interest taken from a registered owner, and the formal instrument of transfer subsequently executed in pursuance of the contract confers merely an equitable interest of the same kind but of greater value. Interests taken from persons who are not registered will vary in kind and value according to the status of the grantors or assignors. These interests will be less likely to be defeasible (and therefore more valuable) if they are either complete rights of equitable ownership, such as the interest of a beneficiary under a protected trust instrument, or rights of property as distinguished from mere claims to specific performance, such as a charge or a right to be forthwith registered as owner.[14] The assignee of a right to set aside an existing registration can of course only realize his interest by embarking on the necessary litigation.[15]

Equitable interests may amount to little, if any, more than a purely personal right, though in general they are actual interests or rights of property, in the land. The difference in this respect in different jurisdictions is referred to in Chap. IV, Sect. 7—"Unregistered transactions" *ante*, p. 111. The jurisdiction in which certain equitable interests are most likely to be classed as purely personal rights is the Federated Malay States, and the interests most likely to be so classed are those arising under non-statutory

[12] *Barry* v. *Heider* (1914) 19 C. L. R. 197, 218.

[13] For examples, see Own. & Inc. 51, 56, 57, 59; Bro. & Gl. 156; Aust. Torr. Syst. 872, 874, 1003; Fi. 1876 (1906), ss. 18, 19.

[14] *Barry* v. *Heider, supra; Acme Co.* v. *Huxley* (1912) 20 West. R. 133 (Al.), stated in Can. Torr. Syst. 276.

[15] *McEllister* v. *Biggs* (1883) 8 A. C. 314.

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and non-registrable instruments purporting to vest the land completely,[16] and those arising under any transaction (for instance a mortgage) carried out in a manner not authorized by the statutes.[17] The Malay statute[18] makes non-statutory transactions "null and void and of no effect"; the non-statutory instrument is not thereby made absolutely void, but assignable personal rights are created which are not true equitable interests in the land.[19] In Leeward Islands also non-statutory dispositions of the land "operate as contracts only."[20] In Manitoba, Saskatchewan, and Alberta,[21] certain mortgages on land securing the purchase money of chattels are made void and unregistrable (in Manitoba void only so far as they affect the land itself); such a mortgage (so far as it has any validity) only gives the rights of an unsecured creditor.[22] In British Columbia and Ireland no estate "legal or equitable" passes until registration; this reduces the interest taken under an unregistered instrument to the level of an assignable contractual right.[23]

The effect, in the jurisdictions above mentioned, of an unregistered instrument which purports, but is not allowed, to give an interest in land is comparable to the effect of a license as distinguished from a lease. In questions of priority this distinction may be of vital importance.[24] Other cases, illustrating the importance of determining whether an interest in land is a purely personal one, or an actual equitable interest, are those relating to hire-purchase agreements and machinery.[25]

An interest in registered land may be equitable only, though if the land were unregistered the same interest would be a legal estate.

[16] Illustrations are: *Gardner* v. *Siau Kuan Chia* (1912) Innes F. M. S. 159; *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491.

[17] An illustration is *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A. C. 209.

[18] F. M. S. 1911, s. 5.

[19] *Loke Yew* v. *Port Swettenham Rubber Co.* and *Haji Abdul Rahman* v. *Mohamed Hassan*, *supra*. Another case cutting down the meaning of "null and void" in a statute is *Choma* v. *Chmelyk* [1918] 2 W. W. R. 382 (Al.), under the Alberta Dower Act.

[20] L. Is. 1886 (1914), s. 6. See *In re Smith* [1916] 2 Ch. 206.

[21] Manitoba—Lien Notes Act (R. S. 1913, c. 115); Alberta—Charges on Land in certain instruments, 1910 (2nd Sess.), c. 5; Saskatchewan—Sas. 1917, ss. 99, 129, 130.

[22] *Gilbert* v. *Ullerich* (1911) 17 West. R. 157 (Sask.).

[23] B. C. 1911, s. 104; I. 1891, ss. 25, 35. The cases under these sections are cited in Chap. IV., Sect. 7—"Unregistered Transactions" *ante*, pp. 114, 115.

[24] An illustration is *King* v. *David Allen & Sons* [1916] 2 A. C. 54.

[25] Illustrations are: *In re Samuel Allen & Sons* [1907] 1 Ch. 575; *In re Morrison Jones & Taylor* [1914] 1 Ch. 50.

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This is clear in the majority of jurisdictions.[26] In England, however, it has been held—and the decision might apply in Ontario—that the old legal estate is not necessarily merged in or abrogated by the registered ownership, and that the latter is not really a right of ownership, but in the nature of an overriding power.[27] There seems to be no such difference between the position of the registered ownership in England and in other jurisdictions as to justify this view. The most obvious difference between the English statute and others is the express permission given by the English Act of 1875 to create estates and interests independently of the registered ownership—a feature however that also occurs in the statutes of Ireland and Ontario.[28] No suggestion has been made in any Irish or Ontario case that the registered owner of freehold land has anything but an estate in fee simple. The permission to create estates "off the register" seems to express merely what is implied in the Australian and other statutes, and to allow what is prohibited in the Federated Malay States and some other jurisdictions (*ante,* p. 167). That interests thus created "off the register" in the Australian jurisdictions are equitable has already been pointed out (*ante,* p. 165).

The extent to which estates less than freehold (that is, leases for years and tenancies) are made equitable interests for want of registration varies in different jurisdictions. So far as leases and tenancies are occupation interests they may in some jurisdictions remain strictly legal interests unaffected by the registered title. This side of the question is dealt with in Chap. III—"Possession and Registration" *ante,* p. 90. With respect to other leases not excepted from the effect of registration of the land and transactions with it, provision is made for the registration (or entry in some way on the register) of leases in every jurisdiction except British Honduras. There every lease is necessarily equitable, since it requires the protection of a caveat.[29] In other jurisdictions provision is made for a registered leasehold title.[30] Any lease, registered neither as substantive leasehold ownership nor as a charge or

[26] *Allison* v. *Petty* (1899) 9 Q. L. J. 125; *Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75; *Macindoe* v. *Wehrle* (1913) 13 S. R. (N. S. W.) 500; *Davis* v. *McConochie* (1915) 15 *ib.* 510; *McEllister* v. *Biggs* (1883) 8 A. C. 314.

[27] *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631; *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47, 75. See Own. & Inc. 91, 121, 145, for criticism of the former case.

[28] Eng. 1875, s. 49; I. 1891, s. 44; On. 1914, s. 68. See Own. & Inc. 230 *et seq.*

[29] B. H. 1914, s. 40, sch. D.

[30] Chap. II.—"Initial Registration," sect. 1, *ante*, p. 24.

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incumbrance on the freehold, must be regarded as conferring an equitable interest only.

Leases in England and Ontario [31] differ in the manner of their registration as incumbrances from such leases in other jurisdictions, and strictly are not entitled (when not registered as substantive leasehold ownership) to be considered as registered. No statutory form is prescribed, and the lease itself is not registered, but a "notice" is "registered," thus placing the lessee's interest on the same footing as any other assurance in non-statutory form protected by restrictive entry. Such an interest should, it is submitted, be classed as equitable. In Ireland [32] the lease may be "registered" as a burden on the land, but this registration does not appear to carry any warranty of title beyond a statutory priority according to date of registration, and it is merely an alternative to registration of substantive leasehold ownership; the interest of the lessee would seem to be equitable only, as in England and Ontario.

Dower in Ireland (where it still exists), and dower and curtesy in England and Ontario,[33] may be protected in precisely the same manner as leases, just referred to. These interests therefore should be regarded as equitable. Dower is seldom mentioned in other jurisdictions.[34]

The priorities inter se of these equitable interests are (apart from the special effect of restrictive entries) governed chiefly by the general rules of equity jurisprudence.[35] The provisions of the registration statutes affect these priorities in two ways: (1) There are enactments relating to the priority inter se of competing statutory instruments presented for registration; (2) The application of the general rules is indirectly affected by the opportunities conferred under the statutes of readily protecting an equitable interest by means of a caveat or other restrictive entry.[36]

[31] Eng. 1875, ss. 50, 51; On. 1914, s. 70. [32] I. 1891, ss. 44, 45.

[33] I. 1891, ss. 45, 49; Eng. 1875, s. 52; On. 1914, s. 71.

[34] See Aust. Torr. Syst. 871. Alberta has a recent "Dower Act" (1917, c. 14), under which the family residence (or "homestead" as defined by the Act) is subject to the wife's rights, similar to those enjoyed by a wife under the old law of dower. The homestead cannot, in general, be disposed of without the wife's consent, and she has an estate for life after her husband's death. The Act replaces the Married Women's Home Protection Act (1915, c. 4), and is itself amended by s. 53 of a statute law amendment Act (1918, c. 4). No formal registration of the homestead is required, and the interest of the wife seems to be an equitable interest only. A case under the Act is *Choma* v. *Chmelyk* [1918] 2 W. W. R. 382 (Al.). There is a similar Dower Act (1919, c. 26) in Manitoba, replacing 1918, c. 21. See also the Saskatchewan Homesteads Acts (1915, c. 29); 1916, c. 27).

[35] *Barry* v. *Heider* (1914) 19 C. L. R. 197; *Acme Co.* v. *Huxley* (1912) 20 West. R. 133 (Al.)

[36] *In re Scanlan* (1887) 3 Q. L. J. 43; *Barnes* v. *James* (1902) 27 V. L. R. 749, 751.

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In all jurisdictions except British Honduras some provision is made by the statutes for priority in interest, where two competing instruments are presented for registration, being secured by priority in time of registration. Even in the case of British Honduras this would seem to be implied. The majority of the statutes contain enactments to the effect that priority in time of registration gives priority of interest, that for this purpose the presentation of the instrument at the registry is the time of registration, and that the production of the certificate of title is usually essential and in case of doubt confers a better right to registration of the instrument presented. The enactments in the nine Australasian jurisdictions, Trinidad-Tobago, and Jamaica, are nearly identical.[37] They differ from others in providing that where two competing instruments are presented simultaneously, registration shall be accorded to that with which the certificate of title is presented. This is, however, almost necessarily implied in other statutes. The Federated Malay States statute[38] follows that of Fiji, omitting the special provision as to simultaneous presentation. Manitoba, Saskatchewan, Alberta, and North-West Territories[39] stand together, the enactments being to the same effect as the Australasian without the special provision as to simultaneous presentation. The Leeward Islands[40] enactments somewhat resemble the last mentioned group, but are drafted differently. British Columbia is quite different, while the Ontario enactments have some resemblance to those of the English statutes;[41] in British Columbia the production of the certificate of title seems not to be made essential. In England and Ireland[42] the provisions as to priority relate chiefly to charges.

The necessity for producing the certificate of title when presenting an instrument for registration of a transaction seems to imply (in jurisdictions other than the Australasian) the provision made in the Australasian jurisdictions that on simultaneous presentation of two competing instruments the transaction in which the

[37] N. S. W. 1900, ss. 36, 38, 41; Q. 1861, ss. 43, 45, and 1877, s. 12; S. A. 1886, ss. 50, 56, 58; Tas. 1862, ss. 35, 38, 39; V. 1915, ss. 53, 59, 61; W. A. 1893, ss. 53, 57, 58; P. 1913, ss. 21, 26, 28; N. Z. 1915, ss. 35, 37, 38; Fi. 1876 (1906), ss. 33, 35, 38, 39; Tr. 1902, ss. 41, 44, 46; J. 1888, ss. 43, 44, 47, 48.

[38] F. M. S. 1911, ss. 19, 21, 24.

[39] M. 1913, ss. 12, 74, 89, 90; Sas. 1917, ss. 25, 26, 50, 54, 63; Al. 1906, ss. 20, 23, 25; Can. 1906, ss. 40, 41, 48, 77.

[40] L. Is. 1886 (1914), ss. 21, 37, 38, 43, 52, 66, 69.

[41] B. C. 1911, ss. 20A, 29, 73, 75; On. 1914, ss. 36, 40, 55.

[42] Eng. 1875, s. 28; 1897, s. 8; 1903-8 Rules, rr. 111, 265, 268. I. 1891, ss. 49, 81; 1910 O. 4, r. 31.

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certificate of title is produced shall have priority of registration.[43] The two cases cited illustrate the difficulty that may arise when the certificate of title is not in the physical possession of either competing party; the question may then be, who is entitled to its possession?[44] This kind of competition for priority is frequently illustrated in cases where the registered owner's land has been sold under an execution.[45] The rights of general creditors and of an execution creditor of the registered owner may also come into competition with other interests, and these often differ in different jurisdictions.[46] Presentation of an instrument prior to initial registration being completed will not in itself usually confer priority,[47] but in Saskatchewan, Alberta, and North-West Territories,[48] caveats may be entered prior to initial registration, and apparently priority might thus be gained.

The question of the effect of restrictive entries such as caveats is nearly always raised in some way in cases of competition among equitable interests. When no such question is raised the decision is governed entirely by the ordinary rules of equitable jurisprudence. Thus, priority in time of creation of interest will primâ facie govern priority in interest.[49] But the person entitled in priority of time may be estopped from asserting his equitable title against another who has given value for an equitable interest in land.[50] A mortgagor whose land has been sold by his mortgagee cannot claim the right to redeem as against the purchaser, even though the latter is not registered;[51] nor could an unregistered second mortgagee under similar circumstances claim the right to redeem.[52]

[43] *Re Greenshields Co.* (1905) 2 West. R. 421 (N. W. T.); *Re American-Abell Co. and Noble* (1906) 3 West. R. 324 (N. W. T.). See Can. Torr. Syst. 44, 116.

[44] *Swanson* v. *Getsman* (1908) 8 West. R. 762 (Sas.).

[45] *In re Deane* (1898) 9 Q. L. J. 106, and other cases in Aust. Torr. Syst. 1024-1026.

[46] *Giles* v. *Lessee* (1879) 5 V. L. R. 38, Aust. Torr. Syst. 1027; *Re Brooks* (1909) 12 West. R. 303 (Sas.), Can. Torr. Syst. 270.

[47] *Richards* v. *Cadman* (1891) 17 V. L. R. 203.

[48] Sas. 1917, s. 133 (2); Al. 1906, s. 86; Can. 1906, s. 133. And see Can. Torr. Syst. 358, 359, as to caveats and registration before the land is on the register.

[49] *In re Rutter* (1888) 3 Q. L. J. 105.

[50] *Barry* v. *Heider* (1914) 19 C. L. R. 197; *Acme Co.* v. *Huxley* (1912) 20 West. R. 133 (Al.); *Honeybone* v. *National Bank of New Zealand* (1890) 9 N. Z. R. 102 (here there was a caveat, but it was held not to affect the question).

[51] *Saltman* v. *McColl* (1909), 12 West. R. 146 (Man.).

[52] An Australian case under the Merchant Shipping Acts seems decisive on this point: *In re Ships "Albion," &c.* (1864) 3 S. C. (N. S. W.) 138.

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Questions of competing equitable interests affected by the entry of restrictive entries seem only to have arisen in jurisdictions which have the "caveat." The priorities in these cases have been affected quite as much by the possibility of entering a caveat as by the actual entry of one, since it has been held to be negligence not to make use of the protection afforded by the statutory method of safeguarding equitable rights. Thus, priority in time of creation of interest has not been allowed to prevail where a caveat has not been entered.[53] And conversely, title by priority in time has been held not to be displaced, on what might otherwise have been sufficient grounds, where the claimant prior in time had entered a caveat and the other claimant had not done so.[54] The mere entry of a caveat is not sufficient to displace the equitable right to registration conferred by possession of the certificate of title.[55]

SECTION 4—PROTECTION BY RESTRICTIVE ENTRY (EXCLUDING TRUSTS).

Although the whole of the present chapter is concerned properly with equitable interests only, as the only interests that need protection by reason of their being unregistered, it is impossible to exclude all reference to what are really legal interests, which (though unregistered) should in theory require no protection by entry on the register. Registration of title is not consistent on this point, for many interests that are treated as strictly legal and independent of registration are yet often referred to as capable of and requiring protection by restrictive entries.

The restrictive entries to be here considered include (in England and Ontario) cautions, inhibitions, and registered notices, but not "restrictions"; these latter are entered only at the instance of the registered owner himself,[1] and in practice would usually be employed only for the protection of trusts, of which it is not intended to treat in this section. In Ireland the restrictive entries are cautions and inhibitions, the place of the registered notice being taken by the registration of burdens in a subsidiary register. In jurisdictions other than England, Ontario, and Ireland, the functions of the caution, the inhibition, and the registered notice,

[53] *Barnes* v. *James* (1902) 27 V. L. R. 749; *North-West Construction Co.* v. *Valle* (1906) 4 West. R. 37 (Man.); *In re Hope & Co.'s Petition* (1903) Jamaica, unreported.

[54] *General Finance Co.* v. *Perpetual Executors Assoc.* (1902) 27 V. L. R. 739.

[55] *Friehe* v. *Cullen* (1879) 13 S. A. R. 35.

[1] Eng. 1875, ss. 58, 59; On. 1914, s. 79. See Own. & Inc. 140; Br. & Sh. 204, 483.

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are for the most part performed by the caveat, and accordingly the caveat is the restrictive entry in those other jurisdictions that is chiefly treated of here.

Some differences in language that are of no substantial importance may first be referred to.

In some enactments the person seeking to have a restrictive entry made is referred to as "being interested in" the property to be protected, in others as having or claiming "an interest in" it. It has been said that the former expression "is of wider compass than" the latter,[2] but it is difficult to see any practical distinction between them, and the expression "interested in" occurs in New Zealand as well as in Ontario—though in New Zealand a narrower view of the right to enter a caveat has been taken than was taken in the Ontario case cited. The two expressions will be treated here as synonymous.

In some enactments the claimant is referred to as "interested in" or "entitled to a right in" the property, in others as "claiming to be interested" or "claiming an interest" in it. There appears to be no practical distinction between these expressions for the present purpose, and they will be treated as synonymous. Though not important, it should perhaps be pointed out that it is only in jurisdictions which have the "caveat" that the word "claim" occurs.

In some enactments the claimant's interest is referred to as being in "land," in others in any "land or charge," in others again in any "land, lease, mortgage, or charge." These expressions have no practical difference for the present purpose, an interest in a charge being necessarily an interest in the land, and the expressions will be treated as synonymous. Nor is it of any importance that in some enactments "land," &c., merely is mentioned, in others "registered land," &c.

In some enactments the caveator is referred to as claiming under an "unregistered instrument," with an enumeration of particular instruments, "or otherwise"—sometimes "otherwise howsoever." The fact that the particular instruments enumerated vary in different enactments seems to be unimportant, and these clauses all have the meaning they would have if each ran ". . . under unregistered instruments of various kinds or otherwise."

In England and Ireland, the claimant may "lodge," and in Ontario "apply for the registration of," "a caution to the effect that" no transaction is to be registered until after notice to the

[2] *Re Clagstone and Hammond* (1898) 28 O. R. 409.

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cautioner, and the prescribed form of caution "requires" that registration shall not take place accordingly.[3] In the other jurisdictions the claimant is authorized to "file a caveat," sometimes "to the effect that" transactions are not to be registered, sometimes "forbidding" registration, and sometimes he is simply authorized to file a "caveat" in the prescribed form.[4] All the prescribed forms however agree in using the word "forbid."

All the enactments are thus substantially at one with respect to the frame of a caution or caveat. The caution "requires" registration not to be effected, the caveat "forbids" registration to be effected. So far therefore as a caveat is a notification that registration is not to be made until notice has been given to the caveator, it is on the same footing as a caution, and to that extent there is no difference of any practical importance between them: each merely claims recognition of the claimant's interest.

The two restrictive entries common to England, Ireland, and Ontario[5] — cautions and inhibitions—differ inter se in this way: a caution is a notification of the claimant's interest, and entitles him to be made aware of any intended transaction by the registered owner (in Ontario "or other named person"); an inhibition is a positive restraint on any transaction by anyone, and operates as an injunction, differing also from a caution in that it is the act of the court or the registrar. The inhibition enactments in all three jurisdictions are worded in nearly the same way, but the Irish enactment is most detailed and appears to be intended to correspond in part with the English "restriction" (*ante*, p. 172).

A caution has been said to be "no more than the notice of adverse claim equivalent to a lis pendens,"[6] but it does in fact operate as a sort of temporary injunction, inasmuch as registration of an intended transaction is delayed until notice has been given to the cautioner and an opportunity afforded him of asserting his rights.[7] It is specially enacted in England and Ontario[8] (though not in Ireland) that a caution is not to "prejudice the claim or title of any person." More detailed provision is made in the Ontario than

[3] Eng. 1875, s. 53; 1903-8, Rules, r. 226, f. 58. I. 1891, s. 69; 1910 O. 7, r. 2, f. 29. On. 1914, s. 72; 1911 Rules, r. 23, f. 19.

[4] Examples of these differences may be seen in statutes of British Columbia, New South Wales, and New Zealand: B. C. 1911, s. 62; N. S. W. 1900, s. 72; N. Z. 1915, s. 146.

[5] Eng. 1875, ss. 53-57, 63, 64; 1903-8 Rules, rr. 226-242. I. 1891, ss. 67, 70; 1910 O. 7, rr. 2-4. On. 1914, ss. 72-78, 85, 86; 1911 Rules, rr. 23-25. See Own. & Inc. 129-135, 139-147; Bro. & Gl. 81, 176, 178.

[6] *Att.-Gen.* v. *Hargrave* (1906) 11 O. L. R. 530.

[7] Own. & Inc. 131, 139, quoted in *Pearson* v. *O'Brien* (1912) 20 West. R. 510, 528 (Man.).

[8] Eng. 1875, s. 64; On. 1914, s. 86.

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in either English or Irish statutes, and in particular in Ontario a second caution may not be entered in respect of the same claim without special permission.

The interest of a "judgment creditor" is expressly included by the English enactment among the "cautionable" interests. In Ireland and Ontario the statutes differ in this respect, but make other and special provision for the protection of judgments and executions.[9] The superiority of these other provisions to mere cautions make it unlikely that a caution would, in these two jurisdictions, be entered in preference, but the interest of a judgment or execution creditor would seem to be sufficient to support a caution.

Lis pendens is not mentioned in the English statutes as capable of protection by caution, though apparently it could be so protected; in Ontario this is expressly provided for.[10] In Ireland a lis pendens may be registered as a burden,[11] but presumably might also be protected by caution.

There seems to be no distinction between caution and inhibition with respect to the kind of interest required to be shewn by the claimant. This interest is described in the widest terms—"any person entitled to any right in," "any person interested in any way in," land or a charge, &c.[12] Any right "to call for or receive a conveyance of land is an 'interest' within the" statutes.[13] There seems to be nothing in the statutes of these three jurisdictions requiring this interest to be one that has been created by an instrument in writing. The most important of such interests—equitable mortgages by deposit of certificate of title—is expressly recognized in all three.[14]

A caution differs from all other restrictive entries on one point. The improper entry of a caution gives the registered owner a statutory right of action for any damage sustained.[15] No such right is conferred in respect of any other entry, and any right of action would be governed by ordinary principles and practice with regard to slander of title or other head of damage.

The third restrictive entry—registered notice—finds a place

[9] I. 1891, ss. 21, 45; Bro. & Gl. 120. On. 1914, ss. 62-65.

[10] Br. & Sh. 27, 199. On. 1914, s. 82.

[11] I. 1891, s. 45; 1910 O. 4, r. 17; Bro. & Gl. 83, 245.

[12] Eng. 1875, ss. 53, 57; I. 1891, ss. 69, 70; On. 1914, ss. 72, 78. See Own. & Inc. 129-132.

[13] *Re Clagstone and Hammond* (1898) 28 O. R. 409.

[14] Eng. 1897, ss. 6 (8), 8 (6); 1903-8 Rules, r. 243. I. 1891, s. 81; Bro. & Gl. 158 (note to s. 45). On. 1914, s. 92.

[15] Eng. 1875, s. 56; On. 1914, s. 85; I. 1891, s. 69 (5).

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only in England and Ontario.[16] Interests thus protected are, in Ireland, protected by being entered as "burdens" or in a subsidiary register.[17] The typical interests in England and Ontario that can be thus protected by registered notice are leases, and rights of dower and curtesy; these are expressly and prominently mentioned, and their protection by registered notice prevents the entry of a caution in respect of them.[18] This "notice" by its "registration" serves merely to give notice of the existence of the interest, and in that sense makes it an "incumbrance." No warranty of the title to the interest is given by the registration of the notice, and the protection given depends simply on the ordinary equitable doctrine of notice, which would operate quite as well by entry on the register in any way of the fact of some outstanding interest being vested in a person other than the registered owner. There are, however, other interests less prominently mentioned in the statutes, but protected in the same way as leases, dower, and curtesy. The most important of these are: (in England) lien by deposit of certificate of title, and (in England and Ontario) conditions restricting the use of land.

Lien or equitable charge by deposit of certificate of title is actually mentioned in the statutes of both Ontario and England, but only in England is express provision made for its protection by special entry on the register.[19] In Ontario it is simply enacted that the deposit of the certificate of title has the same effect as a deposit of title deeds of land, and there is a similar enactment in Ireland.[20] But in England further provision is made for written notice being given to the registrar and entered on the register, and this notice is to "operate as a caution."

Express provision for registration of restrictive conditions or covenants as annexed to land, of which all successive owners are then to be "deemed to be affected with notice," is made both in England and Ontario.[21] The effect of this registration is not to give any further effect to the conditions or covenants, but the registration is simply made the equivalent of notice.[22]

[16] Eng. 1875, ss. 50-52; 1903-8 Rules, rr. 201-207. On. 1914, ss. 70, 71. See Own. & Inc. 125-129. These references relate only to leases, dower, and curtesy; other interests protectable by registered notice are referred to, and the whole subject dealt with, in Own. & Inc. 125-147.

[17] I. 1891, ss. 45, 49, 54; Bro. & Gl. 157-169. A restriction against alienation and subdivision is a registrable burden: *In re Congested Districts Board* [1919] 1 I. R. 146 [18] Eng. 1875, s. 53; On. 1914, s. 72.

[19] Eng. 1897, s. 8 (6); 1903-8 Rules, rr. 243-251. On. 1914, s. 92. See Own. & Inc. 132-134. [20] I. 1891, s. 81.

[21] Eng. 1875, s. 84 (am.); 1903-8 Rules, r. 223. On. 1914, s. 99; 1911 Rules, r. 45.

[22] *Willé* v. *St. John* [1910] 1 Ch. 84, 325. The Ontario section (sub-s. 3) appears to have been amended in accordance with this decision.

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Other registered notices concern such matters as easements. These, even though affecting the land without special mention in the register, may be entered or notified on the register in England, and so as to easements in Ontario, whilst in Ireland all such interests may be registered as burdens.[23]

In England priority for the registration of pending transactions may be secured by a "priority notice."[24] The rights of incumbents of ecclesiastical benefices are also specially dealt with.[25]

The caveat in the jurisdictions other than England, Ireland, and Ontario, takes the place of both caution and inhibition. One restrictive entry, peculiar to Victoria and Western Australia,[26] answers to the English priority notice (*supra*) and enables a pending transaction to be securely registered in priority to any others. The caveat also takes the place, for the most part, of the registered notice, though the principle of the registered notice is also carried out in these jurisdictions by other entries relating to outstanding interests being made on the register. So far as the function of caution, inhibition, or registered notice respectively are performed by the caveat, judicial decisions on the enactments relating to the latter will frequently be found applicable to the three former restrictive entries.

The interest in land entitling a caveat to be entered—the "caveatable interest"—is, on the whole, the same in all nineteen jurisdictions; some exceptions to the general uniformity (the principal relating to equitable mortgages by deposit) will first be mentioned.

In British Honduras[27] a caveat must be supported by an interest under a "written instrument," or under a judgment, decree, or lis pendens. A caveat could not therefore be entered in respect of an equitable mortgage by deposit of certificate of title only, though apparently it would be sufficient if there were a memorandum of deposit, however informal.

In British Columbia[28] "no equitable mortgage or lien created simply by a deposit of title deeds and memorandum thereof shall entitle the person interested to registration" (s. 33), and no instrument "shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered" (s. 104). On

[23] Eng. 1875, s. 18 (am.); Own & Inc. 1909, 110, 296-298. On. 1914, s. 23. I. 1891, s. 45. As to easements in Ontario, see *McClennan* v. *Powassan Lumber Co.* (1909) 15 O. L. R. 67, 17 *ib.* 32.

[24] Eng. 1903-8 Rules. r. 117: Own. & Inc. 138.

[25] Eng. 1897, s. 15; Br. & Sh. 330, 331.

[26] V. 1915, ss. 196-200; W. A. 1893, ss. 146-150; Aust. Torr. Syst. 979.

[27] B. H. 1914, sch. D.

[28] B. C. 1911, ss. 33, 62, 104.

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general principles these enactments are not inconsistent with a deposit without any writing constituting such an interest in the land as would confer a right to caveat.[29] But the "interest" under an instrument that was unregistrable, and therefore could not eventually pass any "estate or interest" in the land, is in the nature of a purely personal interest and not an equitable interest in the land itself. It is possible therefore that such an "interest" could not be protected by caveat; on the other hand, "interest" might be held to have here an extended meaning, and so capable of protection by caveat. It is perhaps an argument in favour of not thus extending the meaning of "interest" that a caveat can only be entered "by leave of the registrar"; yet the caveatable interest is described in the widest possible manner—"under any . . . unregistered instrument, as heir-at-law, or otherwise howsoever" (s. 62).

In New Zealand it is enacted by a general statute that land is not to be "charged or affected by way of equitable mortgage or otherwise" by a deposit of title deeds, with or without a written memorandum; the statute is to be "construed so as not to conflict with" the registration statutes.[30] As the registration statute is silent on the subject of equitable mortgage by deposit of certificate of title, the general statute appears to be the governing enactment and to prevent a valid charge being created by such a deposit. As in British Columbia, therefore, a depositee in New Zealand could only claim to have a caveatable "interest" in the land by extending the word "interest" to include a purely personal interest.

In Trinidad-Tobago, though the right of a depositee to protect his interest by means of a caveat seems not to have been disputed, the interest conferred by deposit of certificate of title as security has been held not to be in the nature of a mortgage, the depositee having a mere right of action for his money; in such an action he can obtain judgment for principal and interest, but not a declaration that he is a mortgagee.[31] This is an approximation to the

[29] *White* v. *Neaylon* (1886) 11 A. C. 171. Other cases are cited in Hogg's Deeds Reg. in Australasia, 15, 29.

[30] N. Z. 1915, s. 1; Property Law Act 1908 (No. 152), s. 63; *Beckett* v. *District Land Registrar* (1909) 28 N. Z. R. 788. See Martin's Prop. Law Act 1905, p. 109. N. Z. 1915 does not (nor did the repealed statutes) contain any reference, such as is contained in many statutes, to the possibility of a certificate of title, when not produced at the registry, being deposited as security: see ss. 40, 80, and contrast such enactments as N. S. W. 1900, s. 38; J. 1888, s. 122, &c.

[31] *Lascelles* v. *Benlisa* (1912) 2 Tr. & Toh. 181. Aust. Torr. Syst. 787 was quoted, but the case goes beyond any statement there made, and is in fact opposed to the principle of most of the Victorian decisions there relied on: see particularly *Charters* v. *Cosmopolitan Land Bank* (1902) 28 V. L. R. 251.

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position in British Columbia and New Zealand—that the depositee has a purely personal interest, not an equitable interest in the land —and seems out of harmony with the view taken in the Australian and other cases under enactments from which the Trinidad-Tobago statutes do not differ in any material point.[32]

In six jurisdictions—Queensland, Western Australia, Papua, Fiji, Federated Malay States, Leeward Islands[33]—it is specially enacted that an equitable mortgage by deposit of certificate of title may be protected by caveat, though the language of the enactments differs a good deal, only those of Queensland and Papua being exactly alike. In Federated Malay States the word "lien" only is used, though otherwise the enactment is like that of Fiji. It has been held in Fiji that a caveat can only be entered if the caveator is prepared at once to enforce his rights as equitable mortgagee,[34] but it is not clear upon what reasoning this opinion rests.

In South Australia[35] the right to enter a caveat seems to be impliedly conferred by the joint operation of the enactments enabling an equitable mortgage by deposit to be created, and the terms of the enactments which refer directly to caveats—the caveatable interest including interests arising "otherwise" than under written instruments.

In seven jurisdictions—New South Wales, Tasmania, Victoria, Western Australia, Manitoba, Jamaica, Trinidad-Tobago[36] — the statutes imply that an equitable mortgage by deposit may be created, in referring to the possibility of a missing certificate of title being "deposited as security"; the caveatable interest also need not necessarily arise under a written instrument, but may be created "otherwise." In several of these jurisdictions the validity of equitable mortgages by deposit has been judicially upheld, and this seems to imply that they may be protected by caveat.[37]

[32] See particularly Tr. 1902, s. 126, which was not cited in *Lascelles* v. *Benlisa* (*supra*). This section refers to the possibility of a certificate of title being "deposited as security for any loan," and the corresponding enactment in Jamaica has been held to constitute a recognition of equitable mortgage by deposit: *Alexander* v. *Simpson* (1903) Jamaica, unreported. And see note 30 on New Zealand.

[33] Q. 1877, s. 30; W. A. 1893, s. 137; P. 1913, s. 58: Fi. 1876 (1906), s. 109; F. M. S. 1911, s. 80; L. Is. 1886 (1914), ss. 59-63.

[34] *Wilson* v. *Bank of New Zealand* (1891) Udal's Fiji R. 259.

[35] S. A. 1886, ss. 149, 191.

[36] N. S. W. 1900, ss. 38, 72; Tas. 1862, ss. 82, 93; V. 1915, ss. 78, 183; W. A. 1893, ss. 74, 137; M. 1913, ss. 60, 138; J. 1888, ss. 113, 122; Tr. 1902, ss. 116, 126.

[37] Aust. Torr. Syst. 787; *Hall* v. *Commercial Bank* (1896) 22 V. L. R. 561; *Alexander* v. *Simpson* (1903) Jamaica, unreported; *Lascelles* v. *Benlisa* (1913) 2 Tr. & Tob. 181.

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In the remaining three jurisdictions—Saskatchewan, Alberta, North-West Territories—the statutes are silent on the subject of equitable mortgages by deposit. It has however been held in Alberta that such a security can be created,[38] and this would apply in the other two. The terms of the enactments authorizing the entry of a caveat differ; in Saskatchewan the enactment is general—"any person claiming to be interested" may enter a caveat, in Alberta and North-West Territories there is an enumeration of instruments, &c., followed by "or otherwise."[39] The course of legislation in Saskatchewan indicates that an interest to be caveatable need not be created by any written instrument.[40] In Alberta a caveat not supported by an instrument in writing has been held good,[41] and this would apply in North-West Territories. It would seem therefore that in these three jurisdictions the interest of an equitable mortgagee by deposit of certificate of title would be a caveatable interest, whether there were a memorandum in writing or not.

The nineteen jurisdictions are not quite uniform on the question whether an interest not evidenced by writing (other than a mortgage by deposit) will support a caveat. This has already been referred to incidentally. In Fiji and Federated Malay States the enactments contain enumerations of specific instruments sufficient to support a caveat, followed by the words "or otherwise,"[42] as in many other statutes. But in these jurisdictions it must be considered doubtful whether interests (other than equitable mortgages by deposit) not evidenced by writing will support a caveat. In the Federated Malay States judicial opinion is divided as to whether the words "or otherwise" are to be interpreted *ejusdem generis* with the preceding enumeration of instruments,[43] and considerations which apply to this statute apply also in Fiji.

There are three other jurisdictions—British Columbia, Leeward Islands, Western Australia[44]—in which it is perhaps doubtful whether interests (other than mortgages by deposit) not evidenced by writing are caveatable. In British Columbia the enu-

[38] *Fialowski* v. *Fialowski* (1911) 19 West. R. 644 (Al.). *Acme Co.* v. *Huxley* (1912) 18 West. R. 534; 20 *ib.* 133 (Al.).

[39] Sas. 1917, s. 128; Al. 1906, s. 84; Can. 1906, s. 131.

[40] Sas. 1909, s. 125 (Can. Torr. Syst. 507) was amended by s. 15 of 1913, c. 30, and the words "whether under an instrument in writing or not" inserted. See Can. Torr. Syst. 366 *et seq.*

[41] *Re MacCullough and Graham* (1912) 21 West. R. 349 (Al.), and cases in note 38.

[42] F. 1876 (1906), s. 93; F. M. S. 1911, s. 70.

[43] *In re Registration of Caveat* (1908) Innes F. M. S. 114; *Chang Lin* v. *Chang Swee Sang* (1908) *ib.* 95; 109; *Chang Gun Lai* v. *Lim Chu Kuan* (1911) *ib.* 126, 131. These cases are discussed in Innes F. M. S. 51.

[44] B. C. 1911, s. 62; L. Is. 1886 (1914), s. 112; W. A. 1893, s. 137.

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meration in the defining clause includes, besides instruments, "as heir-at-law or otherwise howsoever," and this seems consistent with interests other than documentary being protected. In the Leeward Islands "any person claiming to be entitled to stay the registration of any dealing in land until his rights therein shall be recognized and registered, may present a caveat. . . ." This also seems not inconsistent with a non-documentary right being protected, though the two possible constructions are very evenly balanced. In Western Australia the precise enumeration of particulars, including charges by deposit, and notwithstanding the words "or by devolution in law or otherwise," seems to point to the exclusion of all other interests not evidenced by writing; such other interests would not therefore be caveatable.

The British Honduras [45] statute is precise, and no claim can be protected by caveat unless it arises under a "written instrument," or under a judgment, decree, or lis pendens.

In nine jurisdictions — New South Wales, South Australia, Tasmania, Victoria, New Zealand, Trinidad-Tobago, Jamaica, Alberta, North-West Territories [46] — there seems no reasonable doubt that interests evidenced otherwise than by writing may be protected by caveat. The defining clauses refer to instruments—often "devolution in law"—"or otherwise." In South Australia the phrase is: "under an agreement, or under an unregistered instrument, or otherwise"; in New Zealand: "by virtue of any unregistered agreement, or other instrument, or transmission, or of any trust express or implied, or otherwise howsoever." In Alberta and North-West Territories, in addition to will, deed, unregistered instrument, &c., the claim may be "under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially but the title to which is registered in the name of some other person, or otherwise." In New Zealand the right to enter a caveat on the strength of an unwritten trust is settled by judicial decision,[47] and there seems no reason why this should not apply to other cases of interests not evidenced by writing, and in other jurisdictions. In New South Wales a caveat may be entered on the general ground that the then registered owner should not have been placed on the register,[48] and this principle seems applicable in other jurisdictions. In Alberta a part-

[45] B. H. 1914, sch. D.

[46] N. S. W. 1900, s. 72; S. A. 1886, s. 191; Tas. 1862, s. 82; V. 1915, s. 183; N. Z. 1915, s. 146; Tr. 1902, s. 116; J. 1888, s. 113; Al. 1906, s. 84; Can. 1906, s. 131.

[47] *D'Albedyhll* v. *D'Albedyhll* (1885) 3 N. Z. S. C. 391.

[48] *Re Hamilton* (1902) 2 S. R. (N. S. W.) Eq. 117.

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nership interest not in writing has been held sufficient to support a caveat.[49] Among "instruments," a plan has been held sufficient to support a caveat.[50]

In the remaining four jurisdictions—Queensland, Papua, Manitoba, Saskatchewan [51] — there is nothing to cut down the generality of the language used—"any person claiming an estate or interest," or "to be interested," in land may enter a caveat. In these jurisdictions therefore it seems clear that a caveator need not necessarily rely upon an interest under an instrument in writing.

Certain interests under instruments in writing, which would ordinarily constitute valid interests in land and could accordingly be protected by caveat, have in some jurisdictions been either made altogether void or reduced to the level of purely personal interests not affecting land, and therefore incapable of protection by caveat. Thus, in Manitoba, Saskatchewan, and Alberta,[52] a caveat cannot be entered in respect of certain instruments purporting to secure the purchase money of chattels on the purchaser's land. Nor, if the registration of a mortgage is prohibited, can a caveat be entered in respect of the mortgage.[53] But the case of merely informal securities must be distinguished, and these (though consisting of unregistrable instruments) may usually be protected by caveat.[54] The question of the alteration of the law of securities by deposit in New Zealand is referred to *ante,* p. 178.

Judgments and executions are in most jurisdictions the subject of special provisions for their protection by entry on the register. Tasmania [55] appears to be the only jurisdiction in which express authority is conferred on a judgment creditor to enter a caveat, though this could probably be done elsewhere; and a caveat has been held good in Manitoba.[56]

[49] *Re MacCullough and Graham* (1912) 21 West. R. 349 (Al.).

[50] *In re Grand Trunk Pacific Branch Lines Co.* (1912) 22 West. R. 515 (Sas.), under the repealed Sas. 1909, s. 125.

[51] Q. 1861, s. 98; P. 1913, s. 63; M. 1913, s. 138; Sas. 1917, s. 128. As to Saskatchewan, see note 40.

[52] Manitoba—Lien Notes Act (R. S. 1913, c. 115), s. 4; Sas. 1917, ss. 99, 129, 130; Alberta—Charges on Land in certain instruments (1910, 2nd Sess. c. 5). See Can. Torr. Syst. 370.

[53] *Re International Harvester Co.* (1909) 9 West. R. 680, 11 *ib.* 29 (Sas.), cited as *Re Ebbing* in Can. Torr. Syst. 370.

[54] *Smith* v. *American Abell Engine Co.* (1907) 5 West. R. 329, 6 *ib.* 179 (Man.); *Rogers Lumber Co.* v. *Smith* (1913) 23 West. R. 946 (Sas.); *Coast Lumber Co.* v. *McLeod* (1914) 29 West. R. 357 (Sas.). And see Aust. Torr. Syst. 1036, quoted in *Imperial Elevator Co.* v. *Olive* (1914) 29 West. R. 339, 348 (Sas.).

[55] Tas. 1886, s. 22. Compare Eng. 1875, s. 53, as to "caution."

[56] *North of Scotland Canadian Mortg. Co.* v. *Thompson* (1900) 13 Man. R. 95.

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With respect to lis pendens the statutes shew no uniform principle. In some the registration of a lis pendens is forbidden, in others it is allowed. Where the statutes are silent, it has been held that registration is not permissible.[57] But a prohibition against registration does not necessarily prevent the entry of a caveat, which is not registration but merely notification of a claim. Where a lis pendens is allowed to be registered as a charge on the land—as in British Columbia—it may be treated as a caveat and kept on the register upon security being given to cover damages.[58] The lis pendens may be so serious a cloud on the title as to justify rejection of an application for registration.[59]

Easements may, it would seem, be the subject of a caveat. It has been so held in New Zealand,[60] and the principle seems applicable elsewhere. That an easement is a caveatable interest seems to have been assumed, though not decided, in New South Wales and Saskatchewan.[61] In South Australia and Western Australia [62] "an easement in gross" is an interest that can be formally registered, and thus would appear to be capable of protection by caveat. Though not of course conclusive, the validity of a caveat entered by the owner of an easement upon an initial application [63] is a strong argument in favour of an easement being a caveatable interest after land has been placed on the register. That an easement is a caveatable interest seems also to follow from the cases which decide that public rights of user cannot be the subject of a caveat upon initial registration, when the caveator is not entitled to litigate the question between the owner of the land and the public.[64] These public rights are not prejudicially affected by the fact of the land being registered in the name of the owner of the soil.[65] But it is apprehended that the right to litigate would carry with it the right to enter a caveat, and that in any case in which (as in the case last cited) an

[57] *Syndicat Lyonnais* v. *McGrade* (1905) 36 Can. S. C. R. 232.

[58] *Towne* v. *Brighouse* (1898) 6 B. C. R. 225.

[59] *Granby Consolidated Mining Co.* v. *Esquimault Ry.* [1919] 3 W. W. R. 331 (Privy Council).

[60] *In re Faulke's Caveat* (1906) 26 N. Z. R. 392. Other Australasian cases are cited in Aust. Torr. Syst. 1037.

[61] *In re Paul* (1902) 19 W. N. (N. S. W.) 114; *Re Jamieson Caveat* (1913) 23 West. R. 921 (Sas.); *Roaf* v. *Grand Trunk Pacific Co.* (1915) 31 West. R. 893 (Sas.). And see Aust. Torr. Syst. 1037.

[62] S. A. 1886, s. 81; W. A. 1909, s. 15.

[63] *In re Houison* (1897) 18 N. S. W. 300; Aust. Torr. Syst. 745.

[64] *Concord Munic. District* v. *Coles* (1905) 3 C. L. R. 96; Aust. Torr. Syst. 746.

[65] *Vickery* v. *Strathfield Municipality* (1911) 11 S. R. (N. S. W.) 354; Chap. IV., sect. 1 *ante*, p. 99.

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injunction was claimed the plaintiff would be held entitled to enter a caveat as a preliminary proceeding.

Covenants running with the land are sometimes protected by an entry of their existence being made on the register. Where this is not done, such covenants would be interests in the land entitling to protection by caveat. As to this there could be no question if the covenant were one running with the land at law. The question of covenants running with the land in equity is referred to later on.

The expression "interest" or "interested" in land occurs in every one of the enactments by which the caveatable interest is defined, except in the Leeward Islands.[66]—where a caveat may be entered by "any person entitled to stay the registration." The latter phrase would seem to mean that a claim to any defined right relating to the land and enforceable against its owner will be sufficient caveatable interest. This is in fact a possible interpretation of "interest" in all jurisdictions, and has received judicial sanction in at least one—Federated Malay States,[67] where the "wide and comprehensive" wording of the enactment is referred to. That the words of a corresponding enactment authorizing the entry of caveats "should have a wide interpretation given to them" has also been laid down in New Zealand.[68] The necessity for protecting unregistered interests by means of injunctions,[69] and the close resemblance that the caveat bears to an injunction,[70] justify the general principle of giving an extended meaning to the "interest" which will support a caveat. It must of course be borne in mind that (as already pointed out *ante,* p. 173) "interest" includes a claim to an interest; the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests,[71] and of interests that have not yet become actual interests in the land.[72]

[66] L. Is. 1886 (1914), s. 112.

[67] *In re Registration of Caveat* (1908) Innes F. M. S. 114, the passage apparently being adapted from Aust. Torr. Syst. 1035. The section (s. 68) interpreted in this case is now F. M. S. 1911, s. 70.

[68] *In re Bielfeld* (1894) 12 N. Z. R. 596.

[69] *McEacharn* v. *Colton* [1902] A. C. 104.

[70] Aust. Torr. Syst. 1035, 1036, 1039; *In re Registration of Caveat* (*supra*), approving of the statement in Aust. Torr. Syst. on this point. In *Concord Munic. District* v. *Coles* (1905) 3 C. L. R. 96, 108, it was said: "The lodging of a caveat [on initial registration] is really in the nature of the initiation of litigation:" this seems to apply equally to a caveat against transactions after the land is registered.

[71] This seems to be the principle underlying *Imperial Elevator Co.* v. *Olive* (1914) 29 West. R. 339 (Sas.), where (at p. 348) Aust. Torr. Syst. 1036 is quoted.

[72] As in cases like *Lake Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491.

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It may be taken as settled that any right which would amount to an actual equitable interest—and à fortiori a legal interest—in the land (if unregistered) under ordinary English law, or a claim to such a right, is, subject to some exceptions already noticed, a caveatable interest.[73] In the common case of a contract for the sale of land, the purchaser has an equitable interest sufficient to support a caveat; if he is not yet entitled to a transfer and has therefore no lien upon the land, he is still entitled to enter a caveat.[74]

A right to cut standing timber is an interest in land that can be protected by a caveat.[75] A right to be relieved from forfeiture of a lease is not such an interest as can be so protected.[76] What is in general an equitable interest in land is a question of general law which crops up from time to time in all jurisdictions, apart from registration of title.[77] Ordinarily, an option of purchase is to be regarded as an actual interest in the land, this being a right enforceable by the purchaser and capable of becoming a binding contract at his will without any further act on the part of the vendor.[78] And a right under a contract may be considered to be an equitable interest in land, sufficient to support a caveat, even though the contract is binding (and the interest therefore valid) only as between the parties and not as against a third person—for instance, the vendor of one of the parties.[79] The interest of a partner, where the land was partnership assets, has been held sufficient to support a caveat,[80] but it is not every contract of partnership that gives a partner an interest in the land itself.[81] Covenants and conditions running with the land in equity [82] must be considered as interests in land; these therefore should be susceptible of protection by caveat, and this has been impliedly recognized in some Manitoba statutes.[83] The interest of the next of

[73] See Aust. Torr. Syst. 1035.

[74] *Hill* v. *Keene* (1903) 23 N. Z. R. 404.

[75] *Conolly* v. *Noone* [1912] S. R. Q. 70; other cases in Aust. Torr. Syst. 1035. And see On. 1914, s. 77.

[76] *In re Graves* (1905) 7 N. Z. Gaz. 318.

[77] Illustrations are: *Morland* v. *Hales* (1910) 30 N. Z. R. 201; *Howard* v. *Miller* [1915] A. C. 318; *Central Trust Deposit Co.* v. *Snider* [1916] 1 A. C. 266; *King* v. *D. Allen & Sons* [1916] 2 A. C. 54; *Mant* v. *Deputy Federal Commr.* (1915) 20 C. L. R. 564.

[78] *Morland* v. *Hales*, *supra*.

[79] *McKillop* v. *Alexander* (1912) 45 Can. S. C. R. 551; *Re Green Caveat* (1912) 23 West. R. 57 (Sas.).

[80] *Re MacCullough and Graham* (1912) 21 West. R. 349 (Al.).

[81] *Mant* v. *Deputy Federal Commr.*, *supra*.

[82] As in *Rogers* v. *Hoscgood* [1900] 2 Ch. 388, and *In re Nisbet and Potts' Cont.* [1906] 1 Ch. 386.

[83] Can. Torr. Syst. 366. Other similar amending Acts are: (1913) 3 Geo. 5, c. 56, adding ss. 169 and 170 to R. S. M. c. 148 (repealed Real

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kin to a deceased registered owner is sufficient to support a caveat,[84] but not the mere expectation (during the life of the owner) of succeeding as next of kin to the property.[85]

The difficulty with regard to caveats is to determine whether, and to what extent, an interest which is not an actual equitable interest in the land at all, but a purely personal and contractual right relating to the land, can be protected by caveat. As pointed out above (p. 184) the view that "interest," for the purpose of the right to enter a caveat, is any defined right or claim relating to the land and enforceable against its then owner, has received some judicial sanction. Having regard to the intimate connexion between caveats and litigation, it is submitted that any claim which would entitle the claimant to initiate litigation in respect of the land should entitle him to enter a caveat, whether the claim be based on an equitable interest or only a contractual right. Further judicial sanction for this view is contained in Manitoba and Saskatchewan cases, where it is said: "According to the principles of the Torrens system any right conferred by contract relating to land against the registered proprietor is a sufficient 'interest' to support a caveat."[86] The cases relied on[87] were however concerned with securities for payment of money: no recent case seems to be available as shewing that such an interest as (for instance) a right to affix advertisements to the wall of a building—a mere personal obligation[88] —could be protected by a caveat. The Australasian cases against such an interest being caveatable still stand,[89] and to them must be added a later case in which it was held (but wrongly, it is submitted) that the interest of a covenantee, under a covenant not to

Property Act); (1914) 4 Geo. 5, c. 90, ss. 7-13 (M. 1914). These enactments for the most part correct errors in building restrictions protected by caveat; they would not in England be inserted in public Acts.

[84] *Colonial Invest. Co.* v. *Cobain* (1888) 14 V. L. R. 740.

[85] *In re Annand* (1891) 17 V. L. R. 108. With this case compare *In re Lind* [1915] 2 Ch. 345.

[86] *Thompson* v. *Yockney* (1912) 22 West. R. 863, 865 (Man.), affd. 25 West. R. 602, and again affd. (*Yockney* v. *Thompson*) 50 Can. S. C. R. 1; *Imperial Elevator Co.* v. *Olive* (1914) 20 West. R. 339 (Sas.); *Coast Lumber Co.* v. *McLeod* (1914) 29 West. 357 (Sas.). In the first two of these cases pp. 785, 1035, 1037 of Aust. Torr. Syst. were cited; the passage quoted in the text above is based on Aust. Torr. Syst. 1037, and is reproduced in *Imperial Elevator Co.* v. *Olive* from *Thompson* v. *Yockney*.

[87] *In re Registration of Caveat* (1908) Innes F. M. S. 114; *Yockney* v. *Thompson*, *supra*; *Imperial Elevator Co.* v. *Olive*, *supra*; *Coast Lumber Co.* v. *McLeod*, *supra*.

[88] *King* v. *D. Allen & Sons* [1916] 2 A. C. 54.

[89] *Ex p. Johnson* (1868) 5 W. W. & a'B. L. 55; *Staples & Co.* v. *Corby* (1900) 19 N. Z. R. 517. These cases are criticized in Aust. Torr. Syst. 800, 803, 1037-1039.

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let stables for livery business, could not be protected by caveat.[90] The view above suggested, and the criticism of the Australasian cases, receive further support from the fact that in practice these cases seem not to have been followed in Canada.[91]

A caveat, as already stated *ante,* p. 172, performs the functions which in England, Ontario, and Ireland, are performed separately by caution, inhibition, and registered notice or incumbrance. The exact effect and operation of a caveat varies according to circumstances, and is not quite the same in all jurisdictions. One difference is that in some jurisdictions the existence of the caveat prevents any registration being effected in respect of the land; this is the case in New South Wales, Queensland, Tasmania, Papua, Trinidad-Tobago, Leeward Islands, and British Honduras.[92] But there seems no reason why a caveator's claim should not be framed so as to allow—as for instance where the caveat was only required for protection of a building restriction—registration of transactions that would not interfere with the claim, as in other jurisdictions. Even if a caveat is valid, it will not be allowed to prevent registration of an interest admittedly prior to the caveator's interest, and may therefore have to be removed altogether.[93] In jurisdictions other than those above referred to removal of the caveat would not always be necessary, for registration of transactions is expressly permitted to be made subject to the rights of the caveator. But registering a transaction is not in any way a recognition or confirmation of the caveator's claim.[94] This will not prevent an injunction being granted, under proper circumstances, against the property being dealt with pending the settlement of the caveator's claim.[95]

Although it has been said that a caveat "operates as notice to all the world" of the equitable interest referred to in it,[96] this opinion is contrary to actual decisions,[97] and the better view seems to be

[90] *Woodberry* v. *Gilbert* (1907) 5 Tas. R. 7.

[91] Can. Torr. Syst. 364, 365; Manitoba statute (1914) 4 Geo. 5, c. 90, ss. 7-13, referred to in note 83.

[92] N. S. W. 1900, ss. 72-74, 97, 98; Q. 1861, ss. 98-103, and 1877, ss. 36-40; Tas. 1862, ss. 82-85; P. 1913, ss. 63-70; Tr. 1902, ss. 116-119; L. Is. 1886 (1914), ss. 111-122; B. H. 1914, sch. D.

[93] *In re Swain's Caveat* [1902] S. R. Q. 120.

[94] *Pearson* v. *O'Brien* (1912) 20 West. R. 510 (Man.).

[95] *Bashford* v. *Bott* (1909) 12 West. R. 428 (Sas.); Can. Torr. Syst. 390.

[96] *Butler* v. *Fairclough* (1917) 23 C. L. R. 78, 91.

[97] *Grace* v. *Kuebler* [1917] 1 W. W. R. 1213 (Al.), relying on *Nioa* v. *Bell* (1901) 27 V. L. R. 82, and citing Aust. Torr. Syst. 919 and Own. & Inc. 170, 204, affd. (1917) 56 Can. S. C. R. 1; *Pearson* v. *O'Brien* (1912) 20 West. R. 510, 527, quoting Aust. Torr. Syst. 886, 1040, and Own. & Inc. 131.

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that the entry of the caveat merely serves as notice to persons searching the register, the precaution of searching being neglected at their own risk. The caveat, in fact, does not add to, but merely protects, existing rights.[98]

The form of the caveat and the procedure for determining the rights of the caveator need not be referred to here in any detail.[99] The interest of the caveator must of course be identifiable by the registrar and described with reasonable certainty.[1] In most jurisdictions the enactments forbid a second caveat being entered in respect of the same interest, and where not thus expressly forbidden such a second caveat would seem to be readily removable by the courts. The removal or continuance of a caveat may often depend on the result of a vendor and purchaser dispute.[2] In South Australia and Manitoba special rules of procedure are enacted with respect to caveats.[3] In all nineteen jurisdictions, except British Columbia and British Honduras, the enactments on the subject include provision for compensation being had—by action or summary proceeding—on the part of the owner of the land as against the caveator in case the caveat has been improperly entered.[4] In some jurisdictions any such right to compensation or damages is expressly barred in respect of a caveat entered by the registrar;[5] but this exception is probably unnecessary. British Honduras is singular in giving a right of action against the registrar for improper removal of a caveat through his "carelessness or fraud."[6]

Notwithstanding differences in the wording of the statutes, and verbal inconsistencies in judicial dicta, the effect and operation of a caveat seem alike in all nineteen jurisdictions. The two principal bodies of statutes and cases are the Australian and Canadian,[7] and the substantial identity of the operation of a caveat in these groups is supported by the many references made in Canadian cases to the Australian statutes and cases. There is one peculiarity common to the statutes of Manitoba, Alberta, and Leeward Islands,[8] which

[98] *Butler* v. *Fairclough* (at p. 84) and *Grace* v. *Kuebler*, *supra*.

[99] See Aust. Torr. Syst. 1040-1043; Can. Torr. Syst. 371-387.

[1] *McKillop* v. *Alexander* (1912) 45 Can. S. C. R. 551, 580. A mortgagee's caveat was held good in *Merchants' Bank of Canada* v. *Hastie* (1914) 27 West. R. 764 (Al.).

[2] *Tremblay* v. *Dussault* (1913) 23 Man. R. 128; *Fox* v. *Reid*, *ib.* 152.

[3] S. A. 1886, sch. 21; M. 1913, sch. L.

[4] See Aust. Torr. Syst. 749.

[5] An illustration is *Smith* v. *Registrar-General* [1909] S. A. R. 1.

[6] B. H. 1914, sch. D, r. 10.

[7] Aust. Torr. Syst. 1039, 1040; Can. Torr. Syst. 388-401. Mr. Thom thinks (p. 398) that "in the last analysis" there is "a radical difference in principle" between the Australian and Canadian view of caveats.

[8] M. 1913, s. 151; Al. 1906, s. 97; L. Is. 1886 (1914), s. 113.

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may be referred to here. In Manitoba and Alberta[9] the entry of the caveat has "the same effect as to priority" as if the protected transaction had been registered, and the reference in the Leeward Islands statute to the "registration" of the caveat seems to mean the same thing. But the same view of the effect of a caveat has been held in other jurisdictions.[10] The difference between Manitoba and Alberta on the one hand, and the other jurisdictions, as to the operation of a caveat, is thus not so important as might appear at first sight.[11]

As to what a caveat is and does, the result of numerous cases may perhaps be summed up thus: A caveat is in the nature of a statutory injunction,[12] and is a means of conveying notice to persons who propose to deal with the owner that there are other claims affecting the property;[13] in itself a caveat makes a claim or right neither better nor worse,[14] but marks a point of time at which the merits of competing interests may be judicially determined.[15]

As to how competing interests are affected by the entry of a caveat, the result of the cases seems to be as follows: The statutory permission to enter a caveat will be regarded as a substantive addition to the ordinary rules of jurisprudence, and these rules (as thus supplemented) will govern the question of priority of interest;[16] in the event of a complete equality of merit other than priority in time of creation of interest, priority of interest will be given to the

[9] *Stephen* v. *Gray* (1913) 25 West. R. 55 (Al.).

[10] *In re Scanlan* (1887) 3 Q. L. J. 43; *McKillop* v. *Alexander* (1911) 45 Can. S. C. R. 551 (appeal from Saskatchewan).

[11] Judicial opinion in Manitoba and Alberta seems to be divided as to the extent of the difference: *Stephen* v. *Gray, supra; Pearson* v. *O'Brien* (1912) 20 West. R. 510 (Man.).

[12] *Barry* v. *Heider* (1914) 19 C. L. R. 197, 212, citing Aust. Torr. Syst. 886; *Pearson* v. *O'Brien, supra*, at p. 527, quoting Aust. Torr. Syst. 886—"A caveat is not to be regarded as notice to all the world . . but only as a means of conveying notice, and as a statutory injunction against dealing with the property."

[13] *Pearson* v. *O'Brien, supra.*

[14] *Pearson* v. *O'Brien, supra*, quoting Aust. Torr. Syst. 1040—"A caveat is worthless unless there is in existence at the time of its entry on the register an enforceable right of some kind relating to the land;" *Gilbert* v. *Ullerich* (1911) 16 West. R. 490, 17 *ib.* 157 (Sas.); *McKillop* v. *Alexander, supra.*

[15] *In re Scanlan* (1888) 3 Q. L. J. 43; *McKillop* v. *Alexander, supra; Coast Lumber Co.* v. *McLeod* (1914) 29 West. R. 357 (Sas.); *Imperial Elevator Co.* v. *Olive, ib.* 339.

[16] *General Finance Co.* v. *Perpetual Executors Assoc.* (1902) 27 V. L. R. 739; *Barnes* v. *Jones, ib.* 749; *Butler* v. *Fairclough* (1917) 23 C. L. R. 78; *Arnot* v. *Peterson* (1912) 21 West. R. 153 (Al.); *Re Green Caveat* (1912) 23 West. R. 57 (Sas.).

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person who enters (or is the first to enter) a caveat.[17] That the existence of a caveat is really no more than a circumstance, merely causing the ordinary rules applicable to the question at issue to be supplemented accordingly, is shewn particularly by cases in which the caveator was unsuccessful.[18]

Under many of the statutes official entries may be made on the register for the protection of the Crown, persons under disability, etc. But it is no part of the duty of the registrar to enter any notification of the possibility of future charges arising under general statutes, as for instance, in consequence of an owner being so registered as part of a merely voluntary transaction.[19]

[17] There seems to be no reported case actually laying down this proposition, which represents the ideal position put by Mr. Thom (Can. Torr. Syst. 398) as being the point where the Australian and Canadian views diverge. But if there be a caveat or caveats in existence, it would seem to be impossible that on a completely even balance of merits any equity should be given priority "independently of the Torrens Act" (Can. Torr. Syst. 399), and thus the prior entry of a caveat would have to be given some weight.

[18] Illustrations are: *Giles* v. *Lesser* (1879) 5 V. L. R. 38; *Friebe* v. *Cullen* (1879) 13 S. A. R. 35; *North-West Construction Co.* v. *Valle* (1906) 4 West. R. 37 (Man.); *Gilbert* v. *Ullerich* (1911) 17 West. R. 157 (Sas.); *Grace* v. *Kuebler* [1917] 1 W. W. R. 1213 (Al.), 56 Can. S. C. R. 1.

[19] *Ex p. Cameron* (1894) 15 N. S. W. 139; *Ex p. Dettman* (1918) 18 S. R. (N. S. W.) 545.

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CHAPTER VI.—MORTGAGE AND OTHER MONEY SECURITIES.

SECTION 1.—SECURITIES IN GENERAL.

The change made by registration of title in the methods by which land may be made security for money payments is quite as great as are the changes with respect to the proof of ownership and the protection of equitable interests. Registration of title may be said to have made possible a system of registered charges "doing away with our present anomalous system of mortgages, under which the mortgagee is in law the owner of the land when, in fact, he is only owner of money for which the land is security."[1] Such a system of registered charges, if properly carried out, would result in mortgages—as in Roman-Dutch and other branches of the civil law—being "treated as what they really are, charges to secure debts and not make-believe conveyances."[2] Eventually, perhaps, "the clumsy mortgage by way of "conditional sale" will give way altogether before this "simpler method of securing debts."[3]

Although in all twenty-two jurisdictions the substitution of a charge for a conveyance is rendered possible, it is only in the majority that the statutes have provided complete machinery for the substitution being made effectively. The number of propositions that apply equally in all jurisdictions on this point is surprisingly small. Three of these may be stated here.

1. Mortgages are recognized as charges on, and interests distinct from, the registered ownership, and are not treated as transactions in which the registered ownership has to be vested in the mortgagee. This is true even in British Honduras, where mortgages are barely referred to in the statute, though "land" is expressly distinguished from "incumbrance."[4]

2. Equitable mortgages by deposit of certificate of title are expressly or impliedly recognized, either by the statutes themselves or by judicial decisions whose reasoning applies equally in more jurisdictions than one. The only exception is that in New Zealand

[1] Own. & Inc. 16, quoting from Report of 1870 on the Land Registry Act.

[2] Jour. Comp. Leg. vii. 39 (1906), lecture on Roman-Dutch law by Frederic Mackarness.

[3] See Poll. & Mait. Hist. Eng. Law (2nd Ed.) ii. 124, as to what would have happened in the 13th century, "if the Jews had not been expelled from England."

[4] B. H. 1914, ss. 1, 7, sch. D r. 12.

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it seems probable that a merely personal interest, and not an interest in the land, is created by the deposit, as mentioned *ante,* p. 178; and see *post,* Sect. 4—"Equitable mortgages." Both in British Columbia and British Honduras the statutes clearly imply the possibility of conferring a right of some sort by mere deposit of the certificate of title.[5]

3. In none is there any statutory authorization of mortgages by transfer of the registered ownership of the land to the mortgagee —though sub-mortgages by transfer of the mortgage are authorized (*post,* Sect. 2, Sub-sect. 2). Mortgages by transfer of the land however (in the absence of enactments prohibiting non-statutory transactions) are valid, and in some jurisdictions are customary in certain circumstances.[6]

GROUP 1—BRITISH COLUMBIA AND BRITISH HONDURAS.

The statutes of British Columbia and British Honduras contain no provision for making any statutory mortgage or charge efficacious. In British Honduras it seems to be contemplated that all mortgages shall be left unregistered and be merely protected by caveat; no form of mortgage or charge is prescribed or referred to.[7] In British Columbia no form of mortgage or charge is prescribed; registration is essential, and operates as notice and confers priority and a primâ facie title, but nothing more is said as to the operation of registration on mortgages specially.[8] In both jurisdictions the statutes refer to mortgages and also other incumbrances.

The result of the enactments making the registered title of the owner of land conclusive seems to be that mortgages and other charges occupy much the same position as in jurisdictions where they are more specially provided for. Thus, the validity of all registered incumbrances as against the owner of the land, and their priority inter se, depend on their existence being notified on the face of the register and thus giving notice of their contents—as in the case of statutory mortgages in other jurisdictions.[9] The powers and remedies conferred on the mortgagee will of course be conventional, since none are given by the statutes.

The right to indemnity for loss through wrongful registration of another person extends to those who have only an "interest" in the land, and this seems to include the case of a mortgagee or owner

[5] B. C. 1911, s. 33; B. H. 1914, s. 31.

[6] Building society mortgages in Victoria illustrate this: Aust. Torr. Syst. 796, 943.

[7] See Note 4.

[8] B. C. 1911, ss. 2, 29, 35A, 72, 73, 104.

[9] *In re Goldstone's Mortgage* [1916] N. Z. R. 19, 489, referred to *post,*

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of any other incumbrance, as well as the owner of the land,[10] This right of indemnity seems also to imply that the State warranty of title extends to mortgages as well as the ownership of the land.

GROUP 2—ENGLAND, ONTARIO, IRELAND.

These three jurisdictions differ from all others in having express statutory provision for transactions off the register, that is, in non-statutory form and unregistered. There is also provision, which in the case of England is very ample, for statutory mortgages and other charges; these are dealt with in subsequent Sections of this Chapter. The prescribed form of statutory charge in England and Ireland must be under seal. Sealing in Ontario is expressly made unnecessary.[11]

The enactments in all three jurisdictions agree in recognizing registered land and a registered charge on it as distinct entities, and in expressly authorizing transactions with each—land and charge.[12] Though the language is not identical, it is provided substantially in the same way by each enactment that the transactions off the register are liable to be defeated by registered transactions for value, unless these off register transactions are themselves protected by restrictive entries on the register—including (in Ireland) registration as "burdens" in a subsidiary register. Mortgage and other securities seem to be included in the "estates, rights, interests and equities," and in Ireland "powers"[13] that may be created, but the "effect and operation of a common law unregistered mortgage"[14] is not perhaps (apart from its liability to be defeated for want of a protective entry) the same in all three jurisdictions.

The English enactment differs from the Ontario and Irish in expressly including the registered owner among the persons who may create interests off the register, and this has been construed as a confirmation of the view that the common law and technical "legal estate" may be dealt with alongside the registered ownership.[15] This difference, and other minor differences in the language of the enactments, may perhaps be sufficient to justify the

[10] B. C. 1911, s. 123; B. H. 1914, ss. 15, 16. The decisions under the Australian statutes seem to apply.

[11] Eng. 1903-8 Rules, r. 107; Own. & Inc. 183, 329. I. 1910 O. 4, r. 10, ff. 9, 10. On. 1914, s. 102.

[12] Eng. 1875, s. 49; I. 1891, ss. 44, 95; On. 1914, s. 68.

[13] "Right" in I. 1891, s. 44, includes, by s. 95, "estate, interest, equity, and power."

[14] *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631, 657.

[15] *Capital and Counties Bank* v. *Rhodes*, *supra*, at p. 656.

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opinion that the English case cited does not apply to the Irish and Ontario enactments, and that in these two jurisdictions an unregistered mortgage purporting to pass the old legal estate would not have that effect.[16]

The separation of ownership of the land from mortgages is of course weakened by a continuance of the old system of legal mortgages by conveyance of the fee simple for a term of years. With respect to mortgages and other securities effected by the statutory method of a charge, "land" and "charge" are kept distinct in all these jurisdictions, and the charge is treated throughout the statutes as in the nature of a subsidiary ownership.[17] The statutory registered charge can be made to operate either as a mortgage (its most usual function) or as a security of another kind, and for securing payment of either gross or annual sums.[18] Enactments forming part of conveyancing statutes, and relating to mortgages and charges of unregistered land, are also incorporated and made applicable to these charges.[19]

Provision is also made for the registration of mortgages existing at the time of initial registration as incumbrances on the land, and these are as far as possible placed upon the same footing as registered charges in statutory form, but without any alteration in their priorities inter se.[20] The remedies of the mortgagee will not be affected by the initial registration, and he will have priority over any subsequent statutory charge notwithstanding the registration of the latter, and would on exercising his power of sale be entitled to have the registered ownership vested in the purchaser from him.[21]

The interest taken by the owner of a registered charge in statutory form appears to be a true legal interest, and not a merely equitable charge.[22] The question is more difficult in jurisdictions

[16] *Capital and Counties Bank* v. *Rhodes* is criticized in Own. & Inc. 145. It has been decided under an Australian statute that such an unregistered assurance in non-statutory form does not pass the technical legal estate: *Macindae* v. *Wehrle* (1913) 13 S. R. (N. S. W.) 500.

[17] For instance: Eng. 1875, s. 41; On. 1914, s. 56; I. 1891, s. 43.

[18] Eng. 1875, ss. 22, 26; 1897, s. 9 (1, 3). On. 1914, ss. 30, 31 (2). I. 1891, s. 40. And see Own. & Inc. 114, 122, 188.

[19] Eng. 1897, s. 9 (1, 2); On. 1914, ss. 30 (6), 31 (2); I. 1891, ss. 40 (4, 5), 41 (4).

[20] Eng. 1875, s. 19; 1897, s. 22 (6); 1903-8 Rules, rr. 216, 217, 175-178, 181. On. 1914, ss. 26, 27. I. 1891, ss. 29, 45, 46. The *status quo ante* of priorities is illustrated by an Australian case: *Davidson* v. *O'Hallaran* [1913] V. L. R. 367.

[21] *In re Purvis* [1907] 1 I. R. 447, under s. 29 of I. 1891, but applicable both in England and Ontario. See Eng. 1903-8 Rules, r. 151; Own. & Inc. 163.

[22] Own. & Inc. 101-105, 114-122; L. Q. R. xxiii. 68 (1907)—"The Mortgage-Charge of the Land Transfer Acts."

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where registration with "possessory" title is permitted, but if the incumbrance is created by an owner whose title to his land is fully warranted as against unregistered interests, to call such an incumbrance "equitable" seems an unnecessary debasing of the currency of judicial terminology.

The warranty of title conferred by the statutory conclusiveness of the register has reference primarily to the owner of the land itself and not to incumbrancers. In England, Ireland, and Ontario [23] this is accentuated by the form of the enactments making the register conclusive. In Ireland a general enactment makes the register "conclusive evidence of the title of the owner to the land as appearing thereon" (s. 34), and there are also enactments in all three statutes expressly conferring a fee simple, &c., on the first registered owner of the land and upon a transferee for value, "free from all other" interests. In England and Ireland the register is not expressly made conclusive in favour of the mortgagee.[24] Only in Ontario does the mortgagee take "a charge upon the interest of the chargor as appearing in the register . . . free from any unregistered interests in the land." [25] Transferees of a charge are in a better position, but only in Ireland is the register expressly made conclusive in favour of such a transferee and in favour of a transferee of the land from a mortgagee selling under his power; in Ontario the transferee of a charge takes "free from any unregistered interests therein," but in England such a transferee is merely "not affected by any irregularity or invalidity in the original charge itself of which" he was "not aware." [26]

Thus, in England and Ireland the registered mortgagee gets no express warranty of title beyond that of his mortgagor, the registered owner of the land, and must largely rely on his own mortgage being valid independently of registration; in England a transferee of the mortgage is in the same position, except that his title is not defeated merely by the original charge having been (unknown to him) invalid. Hence a transferee in England, duly registered, of a registered charge which is itself valid but is transferred by a forged instrument of transfer, gets no warranty of title; he can be removed from the register and is not entitled to indemnity from State funds.[27]

[23] Eng. 1875, ss. 7, 30; I. 1891, ss. 30, 34, 36; On. 1914, ss. 10, 42.

[24] *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47, 72, 73, 78.

[25] On. 1914, s. 30 (4).

[26] Eng. 1875, ss. 27, 40 (am.); On. 1914, ss. 35, 54; I. 1891, ss. 40, 41, The Ontario case of *Dodds* v. *Harper* (1916) 37 O. L. R. 37, where the transferee got a better title through registration than the original mortgagee had, would apply in England.

[27] *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47. See Chap. IV., Sect. 9 *ante*, p. 144. In Ireland the transferee of a charge could apparently, in a case like *Att.-Gen.* v. *Odell*, recover indemnity: I. 1891, s. 93 (1) (c).

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This would not necessarily be so in Ontario and Ireland; the question depends to some extent on whether there is any difference as to the effect of registration between an invalid instrument of transfer and an invalid instrument of charge. It may be that the warranty of title given to a registered transferee for value covers the case of the instrument of transfer being a forgery; if this is so, then the forged instrument of charge in Ontario and Ireland would not prevent the mortgagee having a conclusive title by registration.

In these jurisdictions the same principle (enunciated in a New Zealand case),[28] seems to apply as in Australia, &c., according to which the validity of registered incumbrances as against the owner of the land, and their priority inter se, depend on their existence being notified on the face of the register and thus giving notice of their contents.

The English enactment (s. 22 as amended) expressly makes these statutory charges subject to the provisions relating to "qualified or possessory title." This seems to be implied in the statutes both of Ontario and Ireland; it is not intended that a mortgagee shall in general get any better warranty of title than his mortgagor.[29]

The right to indemnity for "loss," through the conclusiveness of the register operating in favour of the wrong person, in all three jurisdictions extends to the case of a charge as well as land being the property lost.[30] This right of indemnity in itself seems to imply that the title to a mortgage, &c., is warranted, as well as the title to the land.

All three jurisdictions have enactments which provide that a title to registered "land" adverse to the registered owner shall not be gained merely by long possession, though in England and Ireland there is a right to rectification of the register on this ground.[31] But, apparently, land only, excluding charges or incumbrances on it, seems to be the subject of these enactments; accordingly, it would seem that in England, Ontario, and Ireland, the limitation Acts, and their effect in barring rights in favour of owners of registered land as against owners of incumbrances thereon, remain in operation.

[28] *In re Goldstane's Mortgage* [1916] N. Z. R. 19, 489.

[29] A possible exception might occur in the case of an incumbrance created before, and registered after, initial registration of the land: see Eng. 1903-8 Rules, r. 175; Br. & Sh. 427; Own. & Inc. 123.

[30] Eng. 1897, s. 7; *Att.-Gen.* v. *Odell*, *supra*; On. 1914, s. 124; I. 1891, s. 93.

[31] Eng. 1897, s. 12; On. 1914, s. 29; I. 1891, s. 52. See Chap. III. *ante*, *p.* 87.

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It seems clear that in all three jurisdictions the same kind of equitable rights can be created in mortgages and charges as in the land itself, and that these rights can be protected by cautions and other restrictive entries. This opinion is based on the provision made for transactions, registered and unregistered, with charges.[32] The transfer of charges has already been referred to (*ante,* p. 195). Other provisions include the creation of unregistered interests in charges, securities by deposit of charge certificate (in England and Ireland) and sub-charges (in England). No provision is made for sub-charges in Ireland, but the practice of creating them exists; in Ontario both sub-charge and deposit of charge certificate would seem to be practicable and valid, notwithstanding the absence of any express provision relating to them in the statutes. The interests that may be protected by cautions and other restrictive entries include interests in incumbrances as well as in the land itself (Chap. V. Sect. 4 *ante,* p. 182).

Express provision is made in all three jurisdictions for charges created subsequently to initial registration taking priority according to date of registration, in the absence of any special right to the contrary.[33] Provision is also made with respect to the priorities inter se of incumbrances existing at the time of initial registration, in England and Ontario, and such priorities have in practice to be determined in Ireland.[34] In England their relative priorities are not affected by the order in which these incumbrances are entered on the register, or by the fact of such entry, though subsequent transactions with them are governed—in the absence of special rights—by priority in registration (*ante,* p. 194). In Ontario there is a somewhat similar distinction, but priority on the whole is determined by reference to the general Registry Act, under which these incumbrances will usually have been already registered.

Powers of realization by sale or foreclosure, powers of entry, and the benefit of implied covenants, are expressly conferred on registered owners of a charge in England and Ontario, and in addition certain provisions of conveyancing statutes are made applicable to registered charges; in Ireland the same powers are in effect conferred by the references to the Conveyancing Acts, though foreclos-

[32] Eng. 1875, s. 49; 1897, ss. 8 (6), 22 (6) (*c*); 1903-8 Rules, rr. 178-181, 243-251. On. 1914, ss. 54, 68 (4). I. 1891, ss. 44 (2), 81 (5); Bro. & Gl. 62 *et seq.*

[33] Eng. 1875, s. 28; 1903-8 Rules, rr. 111-113, 171-173. On. 1914, ss. 36, 55. I. 1891, s. 49; 1910 O. 4, r. 31.

[34] Eng. 1897, s. 22 (6) (*c*); 1903-8 Rules, rr. 175, 176. On. 1914, s. 26. Bro. & Gl. 165.

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ure is in practice not often resorted to.[35] In the case of securities effected otherwise than by the statutory registered charge, the incumbrancer would have his ordinary remedies apart from the registration statutes. But in any case of a security from a registered owner the mortgagee or creditor would sooner or later almost certainly have either to get his security registered, or to have the register rectified by removal of the name of the registered owner his mortgagor or debtor.[36] Foreclosure is effected by proceedings in the courts, just as in the case of unregistered land. In Ireland no mention is made of foreclosure by the statutes or rules. In England and Ontario provision is made for entry on the register of the result of the foreclosure action.[37]

GROUP 3—THE AUSTRALASIAN (NINE) AND REMAINING EIGHT JURISDICTIONS.

The seventeen jurisdictions of this group are: The nine Australasian, four Canadian (Manitoba, Saskatchewan, Alberta, North-West Territories), three West Indies (Jamaica, Trinidad-Tobago, Leeward Islands), and Federated Malay States. The statutes here are all modelled, directly or indirectly, on the early South Australian statute of 1860,[38] the three jurisdictions that exhibit the most considerable divergence from the general type of statute being Fiji, Federated Malay States, and Leeward Islands.

Two of the features common to all seventeen sets of statutes are these: (1) Statutory forms of securities for money are prescribed, which are not under seal [39] and only take full effect by registration; (2) No express permission is given for the creation of unregistered interests. These statutory securities are of two kinds, one operating as a mortgage proper (in many statutes called a "mortgage") and securing money lent (usually with interest), the other operating as a charge for securing payment of gross or annual sums (usually without interest). The latter is, in many statutes, called an "incumbrance," but as explained *ante,* p. 21, the use of this word in this sense is avoided here as much as possible.

[35] Eng. 1875, ss. 22-27; 1897, s. 9 (1, 2); 1903-8 Rules, r. 164; Own. & Inc. 122, 190, 195. On. 1914, ss. 30-35; 1911 Rules, r. 27. I. 1891, s. 40; Bro. & Gl. 153.

[36] An illustration is *Weymouth* v. *Davis* [1908] 2 Ch. 169. And see Prec. Reg. Land, 154.

[37] Eng. 1903-8 Rules, r. 164; On. 1911 Rules, r. 27 (4).

[38] Aust. Torr. Syst. 33, 37.

[39] An anomalous exception occurs in Queensland and Papua instruments of transfer and charge: Q. 1877, sch. T; P. 1913, sch. 7; Aust. Torr. Syst. 240, 940.

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The statutory mortgage or charge is throughout all the statutes treated as an interest distinct from the land itself, and frequently as an interest nearer in kind to leasehold than freehold. Most of the rights exercisable with respect to the land itself can be exercised over charges also, and the expression "land or charge," "leasehold land and charge," &c., are common in the statutes. As in other jurisdictions (*ante*, p. 191), the statutory charge (whether a "mortgage" or other charge) is the subject of subsidiary ownership.

In all seventeen jurisdictions, except the three—Papua, Fiji, Federated Malay States—in which there is no voluntary initial registration, some provision is made for the recognition of mortgages and other incumbrances existing at the time of initial registration. In seven—New South Wales, Queensland, South Australia, Leeward Islands (fully warranted title only), Saskatchewan, Alberta, North-West Territories [40]—the existing incumbrance simply appears on the register as a "qualification" of the warranted title, and nothing is said as to how it is to be enforced against the registered owner of the land.[41] In four—Victoria, Western Australia, Tasmania, Manitoba [42] — the mortgagee may apparently disregard the mortgagor's registered title, and proceed as though the land were not on the register; but this does not seem to give the mortgagee power to remove the land from the register, and in Victoria, Western Australia, and Tasmania, the mortgagee may if he chooses treat his security as though it were in statutory form. In Manitoba mortgages created pending the initial registration are given a special position, and put nearly on the footing of statutory securities. In the remaining three jurisdictions—New Zealand, Jamaica, Trinidad-Tobago [43]—the mortgagee (in New Zealand) "shall," and (in Jamaica and Trinidad-Tobago) "may," exercise his remedies as though the security were in statutory form. It would seem that in all these fourteen jurisdictions mortgages created prior to initial registration have, when entered on the register, as nearly as pos-

[40] N. S. W. 1900, s. 33 (2); Q. 1861, s. 33; S. A. 1886, s. 77; L. Is. 1886 (1914), ss. 4, 8, 127; Sas. 1917, ss. 35, 46; Al. 1906, ss. 26, 29; Can. 1906, ss. 50, 59.

[41] Aust. Torr. Syst. 756, 757; *Re Canadian Pacific Ry.* (1899) 4 Terr. R. 227.

[42] V. 1915, ss. 167-174; W. A. 1893, ss. 124, 128; Tas. 1862, s. 32, and 1893, s. 4; M. 1913, ss. 34, 105, 106.

[43] N. Z. 1915, s. 54; J. 1888, s. 109; Tr. 1902, ss. 34, 81. The word "may" in the two latter statutes is not necessarily permissive, but can be construed as peremptory and equal to "shall": *Crowley* v. *Templeton* (1914) 17 C. L. R. 457.

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sible the same effect as statutory mortgages, except as to priorities inter se—which are not affected.[44]

The interests of the owner of a registered mortgage or charge in statutory form—whether for securing a mortgage debt or otherwise—appears to be a legal interest.[45] Only in Leeward Islands is the question complicated—as in England, Ontario, and Ireland—by registration with " possessory " title. Where the registration of the land confers a full warranty of title, the essential element of defeasibility (which is the hall-mark of an equitable interest) is absent.

In the seventeen jurisdictions, as in the other groups already dealt with, the general principle undoubtedly is that it is the title of the owner of the land that is primarily warranted by the conclusiveness of the register, and not the title of mortgagees. But the enactments in the present group relating to the register's conclusiveness differ from those in the other groups, and are not uniform among themselves. In Fiji and Federated Malay States [46] it seems clear that the register is only conclusive in favour of each successive owner of the land who is registered on the faith of a " genuine transfer or transmission," and that a mortgagee or owner of an incumbrance gets no warranty of title beyond that of his mortgagor the registered owner of the land—he cannot rely completely even on the latter's registration—and must rely on his own incumbrance being valid independently of registration. In the Leeward Islands [47] " all notings of mortgages " are " indefeasible," and it seems clear from this that the register is (as to fully warranted title) conclusive in favour of a mortgagee as well as the owner of the land, and that the mortgagee accordingly has the benefit of a warranty of title on his own account.

The proper construction of the statutes in the other jurisdictions is not so clear. In the eight Australian jurisdictions other than Fiji, and in Jamaica and Trinidad-Tobago, the enactments relating to conclusiveness of the register include provisions which seem to place securities for money on the same footing as the land itself with respect to the effect of registration on the owner's title. In South Australia, Victoria, Western Australia, and Jamaica,[48] the enactments declare that the person named in any registered instrument as the owner of any interest is the registered owner of

[44] *Davidson* v. *O'Halloran* [1913] V. L. R. 367; *In re Purris* [1907] 1 I. R. 447; *ante*, p. 194, as to England, Ontario and Ireland.

[45] Aust. Torr. Syst. 881, 941-945; *ante*, p. 194.

[46] Fi. 1876 (1906), ss. 14, 43; F. M. S. 1911, ss. 8, 28, 30.

[47] L. Is. 1886 (1914), ss. 8, 127, sch. A " indefeasible."

[48] S. A. 1886, ss. 3, 68, 69; V. 1915, ss. 51, 72; W. A. 1893, ss. 52, 68; J. 1888, ss. 43, 55.

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that interest; so in New South Wales, Queensland, Tasmania, Papua, New Zealand, and Trinidad-Tobago,[49] with the addition that the statutory conclusiveness of title as to the register extends to "any entry thereon," whilst in Queensland and Papua "proprietor" is defined as including the owner of a charge as well as of land. The intention of these enactments seems to be to place a registered mortgagee in as favourable a position with regard to warranty of title as the registered owner of the land, and in several cases the courts have referred to mortgagees as enjoying a statutory protection under registration equal to that of the owner of the land.[50] These references, and the enactments just cited, are however subject to the rule which requires that a mortgagee must, in order to get the full benefit of registration, have been registered on the faith of a valid instrument.[51] This is dealt with in Chap. IV, Sect. 9—"Forged and invalid instruments" *ante*, p. 143. The title of a mortgagee has sometimes been referred to as standing or falling with that of his mortgagor.[52]

In Manitoba, Saskatchewan, Alberta and North-West Territories, the enactments on the conclusiveness of the register do not include those just mentioned (South Australia, New South Wales, &c.) as putting incumbrances on a level with land with respect to warranty of title. The interpretation clauses, under which "land" includes "estates and interests in land," do not afford any assistance, since the context in the enactments relating to conclusiveness of title seems against the view that such interests as mortgages are intended to be referred to. In a few instances "mortgagee" is coupled with "purchaser" as entitled to rely on the register.[53] But apparently the statutes in these four jurisdictions cannot be construed so as to confer on a mortgagee any express warranty of title beyond that of his mortgagor the owner of the land.

A mortgagee, however, in all those jurisdictions whose statutes do not expressly make the register conclusive in his favour, is pro-

[49] N. S. W. 1900, ss. 35, 40, 42; Q. 1861, ss. 33, 34, 44, and 1877, s. 3; Tas. 1862, ss. 33, 34, 40; P. 1913, ss. 5, 19, 20, 29; N. Z. 1915, ss. 34, 58, 68; Tr. 1902, ss. 39, 40, 47.

[50] *Gibbs* v. *Messer* [1891] A. C. 248, 254; *Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75, 93; *Bond* v. *McClay* [1903] S. R. Q. 1, 11; *In re Goldstone's Mortgage* [1916] N. Z. R. 19, 26, citing Aust. Torr. Syst. 760, 945, as to registration of mortgages.

[51] *Gibbs* v. *Messer* [1891] A. C. 248, 255. The rule there laid down embodies, though without mentioning it, the enactment on the subject of forged instruments in South Australia; S. A. 1886, s. 69 (2), *ante*, p. 144.

[52] See *Seabrook* v. *McMullan* (1908) 10 W. A. R. 47, 60.

[53] For instance, in Al. 1906, s. 106; Can. 1906, s. 144. But this may have been *per incuriam* in adapting an Australian model: see Can. Torr. Syst. 220. The corresponding enactment (Sas. 1909, s. 138) seems to have been omitted from the present Saskatchewan statute.

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tected as against his mortgagor the owner of the land, and as against other incumbrances registered after his own by the principle which has been thus enunciated in New Zealand:

> . . . there is no certificate of title given to a mortgagee; what he gets is an entry on the registry of the existence of a mortgage, and that being registered, it is the duty of all persons dealing with the property to examine the mortgage and see what it contains.[54]

There are also other New Zealand cases in which the interest of a mortgagee has been definitely treated (with respect to the warranty of the registered title) as on the same footing as the ownership of the land.[55] The purchaser from a mortgagee has his title fully warranted,[56] and the cases [57] which decide that a lessee and his transferee have each a title as fully warranted as in the case of full ownership apply in principle to mortgages.

Another argument in favour of the view that the statutory warranty of title extends to interests like mortgages, as well as ownership of the land, is that a mortgage constitutes an interest for the loss of which indemnity from State funds can be had, and the warranty of title and right to indemnity are in the nature of interchangeable rights. This is dealt with in Chap. X, *post*. This right of indemnity is given by the statutes in all seventeen jurisdictions except Fiji and Federated Malay States. In Leeward Islands [58] the person "aggrieved by the issue of a certificate of title" may obtain "damages for the injury"; the person "aggrieved" may well be a mortgagee. In the other jurisdictions one way in which loss may be suffered is by "deprivation" of land, and this loss or deprivation may be in respect of land after it has been duly and properly placed on the register, as well as by its being in the first instance improperly placed there; in every case this "deprivation," either expressly or by the aid of an interpretation clause, refers to estates or interests in the land—which will necessarily include mortgages and charges, whilst in the Manitoba and Saskatchewan statutes "mortgage" is expressly mentioned.[59] Judicial decision in more than one juris-

[54] *In re Goldstone's Mortgage* [1916] N. Z. R. 19, at p. 26. The decision was affirmed in the C. A. (p. 489). The quotation refers to, and is based on, Aust. Torr. Syst. 760.

[55] *Campbell* v. *Auckland District Registrar* (1910) 29 N. Z. R. 332.

[56] *Anderson* v. *Davy* (1882) 1 N. Z. S. C. 302.

[57] *Rutu Pechi* v. *Davy* (1890) 9 N. Z. R. 134; *Fels* v. *Knowles* (1906) 26 N. Z. R. 604; *Russell* v. *Registrar-General*, *ib.* 1223.

[58] L. Is. 1886 (1914), s. 19.

[59] N. S. W. 1900 s. 126; Q. 1861, s. 126; S. A. 1886, ss. 3, 103; Tas. 1862, s. 125; V. 1915, s. 246; W. A. 1893, s. 196; P. 1913, s. 147; N. Z. 1915, s. 186; J. 1888, s. 136; Tr. 1902, ss. 2, 134; M. 1913, s. 154; Sas. 1917, ss. 2, 160; Al. 1906, ss. 2, 108; Can. 1906, ss. 2, 146.

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diction has also made it clear that indemnity can be recovered in respect of such an interest as a mortgage, as well as of the land itself.[60]

Only in five of the seventeen jurisdictions—New South Wales, South Australia, New Zealand, Manitoba, Saskatchewan[61]—is it provided by statute that a title adverse to the title of the registered owner cannot be gained by mere length of possession subsequent to initial registration, and thus it is only in these five that the question can be raised whether such an enactment applies to incumbrances as well as the land itself. In Manitoba it is provided in the statute itself that the enactment does apply to incumbrances (s. 117), and in New Zealand the law has been judicially laid down to the same effect.[62] The Manitoba enactment expressly saves the effect of limitation Acts on the mortgagor's covenants, and this appears to be implied in New Zealand. That a mortgagee's rights in respect of the land are equally preserved against being barred by lapse of time in New South Wales, South Australia, and Saskatchewan, is perhaps doubtful. The enactment in each case applies (unless helped by the interpretation clause) to "land" only, and it is possible that the context does not allow the word "land" in this place to include incumbrances on it.

The transfer of mortgages is expressly provided for in all seventeen jurisdictions,[63] and though only in two—Manitoba and Saskatchewan—are sub-mortgages referred to,[64] it seems clear that incumbrances on the land can be dealt with in all jurisdictions in the same way as the land itself. Hence equitable interests in incumbrances may be created, and these interests may be protected by caveat and other restrictive entries; the enactments which

[60] *Tolley & Co.* v. *Byrne* (1902) 28 V. L. R. 95; *Wells and Johns* v. *Registrar-General* (1909) 29 N. Z. R. 101; Aust. Torr. Syst. 853. In *Hall* v. *Yorkton Registrar* (1911) 16 West. R. 256 (Al.), it seems to have been assumed that a mortgagee might be entitled to indemnity.

[61] N. S. W. 1900, s. 45; S. A. 1886, s. 251; N. Z. 1915, s. 60; M. 1913, ss. 83, 117; Sas. 1917, s. 61.

[62] *Campbell* v. *Auckland District Registrar* (1910) 29 N. Z. R. 332. This case overrules *Shirley* v. *Tapper* (1904) 23 N. Z. R. 849, referred to in addendum to Aust. Torr. Syst. 962.

[63] N. S. W. 1900, ss. 46, 51, 52; Q. 1861, ss. 65, 66; S. A. 1886, ss. 150, 151; Tas. 1862, ss. 63, 64; V. 1915, ss. 121, 122; W. A. 1893, ss. 82, 83; P. 1913, ss. 37, 38; N. Z. 1915, ss. 89, 90; Fi. 1876 (1906), ss. 46-48; F. M. S. 1911, ss. 33-35; Tr. 1902, ss. 51, 60, 61; J. 1888, ss. 63, 64; L. Is. 1886 (1914), ss. 64-66; M. 1913, ss. 109, 110; Sas. 1917, ss. 122-124; Al. 1906, ss. 66-68; Can. 1906, ss. 104-107.

[64] M. 1913, s. 110; Sas. 1917, s. 122 (4). The New Zealand enactment (from which the Saskatchewan enactment is taken), referred to in Aust. Torr. Syst. 964, has now been repealed and does not appear in the present statute: N. Z. 1915, s. 102.

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authorize the entry of a caveat expressly or impliedly include interests in incumbrances among the interests that may be so protected (Chap. V, Sect. 4, *ante*, p. 173).

The priority of competing mortgages and other incumbrances created after initial registration is provided for in all these jurisdictions by general enactment, and in some by supplementary special enactments. (The question of incumbrances existing at the time of initial registration is referred to *ante*, p. 199). In the majority the general enactment is to the effect that priority among competing instruments is governed by the time of registration and not execution. This distinct statement is not contained in the Leeward Islands statutes, but it is enacted that "dealings shall take effect from the date and act of registration, and not from" execution of the instrument, the date of presentation for registration being made the operative date of transfers, mortgages, &c.;[65] this seems effective in giving priority according to time of registration. In all the Australasian jurisdictions except Fiji, in Manitoba, and in Jamaica,[66] there is merely a general enactment expressly giving priority according to time of registration. In Trinidad-Tobago [67] there is, besides the general enactment just referred to, an enactment that "as between different mortgages and incumbrances" priority goes according to time of registration. In the remaining five jurisdictions—Saskatchewan, Alberta, North-West Territories, Fiji, Federated Malay States [68]—in addition to the same general enactment transfers of "mortgages, incumbrances, and leases" (in Federated Malay States "leases and charges") have priority according to time of registration.

In all seventeen jurisdictions statutory powers are conferred upon registered owners of money securities, such as powers of sale, entry, distress. These statutory powers relate principally to mortgages, but include to some extent non-mortgage securities. The mortgagee's right to foreclose or obtain the mortgagor's property in the land is not, in four jurisdictions—Queensland, Papua, Trinidad-Tobago, North-West Territories—made the subject of detailed statutory enactment; in nine—New South Wales, South Australia, Tasmania, Victoria, Western Australia, Jamaica, Manitoba, Saskatchewan, Alberta—a peculiar method of statutory foreclosure

[65] I. Is. 1886 (1914), ss. 6, 22, 38, 52, 66.

[66] N. S. W. 1900, s. 36 (3); Q. 1877, s. 12; S. A. 1886, s. 56; Tas. 1862, s. 35; V. 1915, s. 53; W. A. 1893, s. 53; P. 1913, s. 21; N. Z. 1915, s. 35 (4); M. 1913, s. 89; J. 1888, s. 44.

[67] Tr. 1902, ss. 41, 76.

[68] Sas. 1917, ss. 63, 122; Al. 1906, ss. 23, 66 (1); Can. 1906, ss. 77, 104 (3); Fi. 1876 (1906), ss. 35, 46; F. M. S. 1911, ss. 21, 33.

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has been provided; in the remaining four—New Zealand, Fiji, Federated Malay States, Leeward Islands—foreclosure is replaced by judicial sale. No statutory remedy has been provided for the case of an equitable mortgage by deposit of certificate of title, but it has been held that the right of the mortgagee is to have an absolute transfer of the land—the equivalent of foreclosure.[69] A mortgagee taking proceedings under any non-statutory mortgage (other than a mere deposit of certificate of title) would probably not obtain satisfactory relief until he could shew that he had (or was entitled to have) a registered security. It has however been said that the old procedure of foreclosure is still applicable to equitable or non-statutory mortgages.[70]

SECTION 2—THE STATUTORY MORTGAGE.

SUB-SECTION 1—CREATION OF MORTGAGE.

As already stated (*ante,* p. 192), in British Columbia and British Honduras no provision is made for a statutory form of mortgage. The present section is more particularly concerned with the twenty jurisdictions in which the statutes contain developed schemes for mortgaging registered land.

In four of these twenty jurisdictions—England, Ontario, Ireland, Federated Malay States—the statutory instrument of mortgage is called a "charge." There is no essential difference between the instruments that are called "mortgages" and those that are called "charges" in the statutes, when these latter are employed to secure a loan-debt, and throughout this book such a charge is referred to as a "mortgage" whenever possible.[1]

In every one of the twenty jurisdictions an express power of creating a security by mortgage is conferred on registered owners of land, the statute directing that an instrument in a certain form is to be executed and registered. In twelve jurisdictions the enactments are to the effect that when a mortgage security is intended to be created, the owner "shall" execute an instrument of mortgage in the proper form, viz.: New South Wales, Queensland, South Aus-

[69] In *Charters* v. *Cosmopolitan Bank* (1902) 28 V. L. R. 251, an order for transfer was made; in *Lascelles* v. *Benlisa* (1912) 2 Tr. & Tob. 181, it was held that the depositee had not the rights of a mortgagee, and Aust. Torr. Syst. 787 was cited. But the Trinidad case seems unsatisfactory, and the Victorian decision sounder.

[70] *Tietyens* v. *Cox* (1916) 17 S. R. (N. S. W.) 48.

[1] See *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A. C. 209. The Federated Malay States statute in many of its sections follows the Fiji statute word for word, only substituting "charge" for the "mortgage" of the Fiji statute.

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tralia, Tasmania, Papua, New Zealand, Fiji, Federated Malay States, Manitoba, Saskatchewan, Alberta, North-West Territories.[2] In eight jurisdictions—England, Ireland, Ontario, Victoria, Western Australia, Trinidad-Tobago, Jamaica, Leeward Islands [3]—the owner "may" mortgage his land by executing an instrument in the proper form. The enactments do not however differ in meaning; the word "may" is in effect as peremptory as "shall," and the enactment containing it points out the only method of mortgaging authorized by the statute.[4] In some jurisdictions—England, Ireland, Ontario, Fiji, Federated Malay States, Alberta, North-West Territories—a direction that the statutory instrument shall be registered is contained in the section that confers the authority to create a mortgage. Leeward Islands [5] is peculiar, the mortgage being expressly constituted by the registration of the statutory instrument, but the instrument would apparently be valid as a contract even before registration. In the remaining jurisdictions—New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Papua, New Zealand, Trinidad-Tobago, Jamaica, Manitoba, Saskatchewan [6]—it is provided by separate enactment that an instrument does not operate as a mortgage security until it is registered, but upon registration does so operate. The effect of all these enactments requiring registration as a condition of a complete security, is substantially the same. This completion by registration is referred to later on.

In all but six of these jurisdictions—the excepted six being England, Ireland, Ontario, Trinidad-Tobago, Leeward Islands, Federated Malay States—there is an enactment providing that the statutory mortgage is to take effect as a security, but is not to oper-

[2] N. S. W. 1900, s. 56; Q. 1861, s. 56; S. A. 1886, s. 128; Tas. 1862, s. 52; P. 1913, s. 46; N. Z. 1915, s. 101; Fi. 1876 (1906), s. 58; F. M. S. 1911, s. 43; M. 1913, s. 107; Sas. 1917, s. 98; Al. 1906, s. 60; Can. 1906, s. 94.

[3] Eng. 1875, s. 22; I. 1891, s. 40; On. 1914, s. 30; V. 1915, s. 145; W. A. 1893, s. 105; Tr. 1902, s. 74; J. 1888, s. 78; L. Is. 1886 (1914), ss. 36, 37. As to Jamaica and Leeward Islands, see also next note.

[4] *Crowley* v. *Templeton*, (1914) 17 C. L. R. 457; *Haji Abdul Rahman* v. *Mohamed Hassan*, *supra*. In Jamaica and Leeward Islands certain mortgages not in statutory form, or otherwise not entitled to be registered, are expressly made valid first charges on the land as though they were in accordance with the registration statutes: see (Jamaica) Hurricane Loans Law 1903 (No. 47), s. 8; (Leeward Islands) Hurricane Loan Title by Registration Amendment Act 1900 (No. 3).

[5] L. Is. 1886 (1914), ss. 6, 36, 37; *In re Smith* [1916] 2 Ch. 206.

[6] N. S. W. 1900, s. 41; Q. 1861, s. 43; S. A. 1886, s. 67; Tas. 1862, s. 39; V. 1915, s. 61; W. A. 1893, s. 58; P. 1913, s. 28; N. Z. 1915, s. 38; Tr. 1902, s. 46; J. 1888, s. 48; M. 1913, s. 91; Sas. 1917, s. 58.

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ate as a transfer of the land.[7] This enactment is really superfluous; it merely makes explicit what was already implied,[8] but it serves to emphasize the change from the old to the new method of mortgaging—by means of a charge instead of a conveyance. In many of the statutes the effect of the statutory "mortgage" is referred to as creating a "charge" on the land.[9]

The statutory mortgage then, in all jurisdictions, creates a charge only, and does not of itself vest the ownership of the land in the mortgagee [10]—it does not effect "any dismemberment of the mortgagor's registered title," but "the mortgagee becomes vested with such rights in respect of the possession of the land and its profits, and the registered title becomes (for the benefit of the mortgagee) subject to such powers of disposition, as the statute expressly or by implication declares." [11]

The totality of the mortgagee's rights over the land conferred on him by the creation of the statutory "charge" is conveniently referred to as his "interest" in the land.[12] It has indeed been said that the statutory mortgage does not "vest in the mortgagee any registered 'interest' in the mortgagor's land, as that term is used in the" statutes,[13] and "in that sense the mortgagee has no estate or interest in the land," [14] but he has nevertheless an "interest" sufficient to enable him to protect his rights by caveat, and the use of the word "interest" to denote his rights generally is therefore appropriate.[15] In other cases it has been laid down that the mortgagee has "an estate or interest in the land" though "less than the

[7] N. S. W. 1900, s. 57; Q. 1861, s. 60; S. A. 1886, s. 132; Tas. 1862, s. 53; V. 1915, s. 146; W. A. 1893, s. 106; P. 1913, s. 47; N. Z. 1915, s. 102; Fi. 1876 (1906), s. 62; M. 1913, s. 108; Sas. 1917, s. 102; Al. 1906, s. 61; Can. 1906, s. 98; J. 1888, s. 80.

[8] *Smith* v. *National Trust Co.* (1912) 45 Can. S. C. R. 618, 650.

[9] For instance, in New South Wales and England: N. S. W. 1900, ss. 56, 57; Eng. 1875, s. 22.

[10] Own. & Inc. 101-104; *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631, 650, 657; Aust. Torr. Syst. 941, 942, cases there cited; *in re Goldstone's Mortgage* [1916] N. Z. R. 19, 489; Can. Torr. Syst. 281, 282; Bro. & Gl. 152, 153; Innes F. M. S. 30.

[11] *Smith* v. *National Trust Co. supra*, at p. 639; *Yockney* v. *Thompson* (1913) 50 Can. S. C. R. 1.

[12] An illustration is *Gibbs* v. *Messer* [1891] A. C. 248, 254.

[13] *Smith* v. *National Trust Co. supra.* The enactment in Manitoba (M. 1913, s. 108) makes the statutory mortgage inoperative "as a transfer of land . . or of any estate or interest therein," but this does not differ in meaning from other corresponding enactments which simply refer to "land."

[14] *Yockney* v. *Thompson*, *supra*, at p. 4; *Toronto General Trusts Corp.* v. *Rex* (1917) 56 Can. S. C. R. 26, affd. by P. C. [1919] A. C. 679.

[15] *Yockney* v. *Thompson*, *supra*; M. 1913, s. 138, by which "any person claiming an estate or interest in land" may enter a caveat.

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fee simple,"[16] and again, that he has "an interest but no estate."[17] In some Canadian jurisdictions this interest is so far in the nature of a transfer of the land from the owner, that a prohibition against certain transfers applies equally to mortgages.[18] In Australia, even the interest of an equitable mortgagee by deposit of the certificate of title is an interest in the land for the deprivation of which indemnity can be had;[19] and the interest of a statutory mortgagee is an interest in land within the meaning of the Trustee Acts which can be made the subject of a vesting order.[20] Thus the difference between the New Zealand and the Manitoba views appears to be merely a question of terminology—whether the mortgagee's interest shall or shall not be called an "estate or interest."

In describing the statutory mortgage as a "charge," it is necessary to bear in mind that the charge is a statutory one, and not what is ordinarily known as a charge in equity jurisprudence, where it is usually distinguished from a security completed by conveyance of the ownership or legal estate. If the statutory mortgage is to be compared to an equitable mortgage at all, it more nearly resembles the equitable mortgage by deposit of deeds (the mortgagor retaining the legal estate) than an equitable mortgage where the legal estate is in either a prior mortgagee or a trustee for the owner.[21] The charge constituting the statutory mortgage is in fact a strictly legal interest—as the registered owner's title is a legal interest—conferring on the mortgagee rights and powers which in the case of unregistered land are usually conferred by conveying the owner's land to the mortgagee. The important question is: What are the rights and powers conferred on the mortgagee?

The frame of the ordinary instrument of mortgage is substantially the same in all jurisdictions, and is modelled on the deed poll, though only in England and Ireland need it be under seal. The instrument consists of a statement that the person executing it (being the owner of the land) "mortgages" it to the mortgagee, or "charges" it with the principal sum and interest in favour of the mortgagee, preceded or followed by (in most jurisdictions) covenants for payment and any permissible stipulations in addition that

[16] *Campbell* v. *Auckland Dist. Registrar* (1910) 29 N. Z. R. 332, 338, 345.

[17] *Reid & Co.* v. *Minister for Works* (1902) 2 S. R. (N. S. W.) 405, 416.

[18] Al. 1906, s. 60 (3)—but now amended by Al. 1919, c. 37; Can. Torr. Syst. 281, 282. Sas. 1909, s. 89 (Can. Torr. Syst. 493), is not reproduced in Sas. 1917.

[19] *Tolley & Co.* v. *Byrne* (1902) 28 V. L. R. 95; Aust. Torr. Syst. 853.

[20] *In re Cain* (1893) 5 Q. L. J. 93.

[21] See *Fink* v. *Robertson* (1907) 4 C. L. R. 864, 873, referring to *James* v. *James* (1873) L. R. 16 Eq. 153.

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may be desired; attestation is in all cases required. In the Leeward Islands there is no express covenant for payment (though one seems to be implied by the language of the prescribed form), and no provision is made for the addition of special clauses; in England and Ontario the covenants for payment are omitted from the ordinary form as prescribed, but these are implied in the instrument by express enactment in the statutes. In England a mortgage to a building society may be made in the form required by the rules of the society [22] and in Western Australia and Jamaica [23] special forms for mortgages to building societies are prescribed. In New Zealand [24] a concise alternative form of mortgage is provided. On the instrument being registered it operates as a charge on the land according to its tenor, and in addition to the rights purporting to be conferred by the instrument itself certain other rights are by the terms of the statutes at once conferred.

Provision is made in the majority of the statutes for substantial adherence to the prescribed forms of instrument being sufficient, and for alterations in and additions to the statutory rights being made. The general law, as it stands in any particular jurisdiction, must of course be complied with, a good illustration of this being the subject of covenants for payment of blended principal and interest in Canada. In all Canadian jurisdictions the amount of principal and rate of interest payable must be stated where principal and interest are to be paid together.[25]

The Leeward Islands statute allows the minimum amount of variation; all instruments must be in prescribed form, "or as near thereto as the circumstances admit." [26] The Trinidad-Tobago statute allows variations, "not being a matter of substance," but there is no provision for the exclusion or modification of implied covenants, &c.[27]

In Saskatchewan, Alberta, and North-West Territories,[28] a

[22] Eng. 1897, s. 9 (3).

[23] W. A. 1893, s. 129, sch. 8; J. 1888, s. 79, sch. 11.

[24] N. Z. 1915, s. 101 (2), sch. 2 G.

[25] Interest Act — a Dominion statute (R. S. Can. 1906, c. 120), ss. 6, 7. Recent cases under this statute are: *Canadian Mortgage Invest. Co.* v. *Cameron* (1917) 55 Can. S. C. R. 409 (from Alberta), and *Standard Reliance Mortg. Corp.* v. *Stubbs*, *ib.* 422 (from Manitoba). In both cases the mortgages appear to have been over registered land, and these cases thus shew that the provincial registration statutes are subject to Dominion legislation.

[26] L. Is. 1886 (1914), s. 2 (5). This provision is almost identical with that in the Merchant Shipping Act 1894, s. 31.

[27] Tr. 1902, ss. 49, 153.

[28] Sas. 1917, ss. 55, 65, 98; Al. 1906, ss. 60, 131; Can. 1906, ss. 94, 172.

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mortgage must be in prescribed form, "or to the like effect," and "every covenant and power . . . implied in any instrument . . . may be negatived or modified by express declaration in the instrument." These provisions are also enacted in Manitoba;[29] in addition, instruments are registrable if "substantially in conformity with" prescribed forms, and variations are allowed, not being "in matter of substance," whilst an unfettered discretion is given to the registrar to accept an instrument in non-statutory form, and so, under certain circumstances, in Saskatchewan.

The above provisions—that every implied covenant and power may be modified by express declaration, and that prescribed forms may be varied in matters not of substance—appear (mostly in identical language) in the statutes of the nine Australasian jurisdictions, Jamaica, and Federated Malay States.[30] In South Australia and Papua instruments in non-statutory form may also be admitted to the register, to prevent "great loss or inconvenience."

In England and Ontario[31] each statutory power given to mortgagees is expressly permitted to be negatived. In Ontario the prescribed forms are to be used "with such alterations and additions only as are necessary to meet the circumstances of each case." In England a wide discretion as to permitting alterations and additions is given to the registrar, but the prescribed forms are to be followed "as nearly as circumstances will permit" where no form is prescribed, and instruments are not to be registered or entries made that are "inconsistent with the principles upon which the register is to be kept." In Ireland nothing is said about negativing or modifying implied covenants or powers, the provisions of the Conveyancing Acts being incorporated in the registration statute; mortgages must be in the prescribed form, "or as near thereto as the circumstances of the case admit," or as may appear sufficient to the registrar, and extra fees are charged on filing instruments in other than prescribed form.[32]

Independently of special enactment, the general rule is that a provision in a registration statute may be waived by those for whose benefit it is inserted.[33] This would enable implied covenants and

[29] M. 1913, ss. 2 (3), 91, 107, 165.

[30] N. S. W. 1900, ss. 39, 80, 103; Q. 1861, ss. 3, 76; S. A. 1886, ss. 54, 247, 262, 275; Tas. 1862, ss. 3, 41, 90; V. 1915, ss. 176 279; W. A. 1893, ss. 131, 238; P. 1913, ss. 5, 83, 126B; N. Z. 1915, ss. 166, 223; Fi 1876 (1906), ss. 40, 114; J. 1888, ss. 100, 128; F. M. S. 1911, ss. 26, 28 (*e*), 85. And see Aust. Torr. Syst. 905.

[31] Eng. 1875, ss. 22-28; 1903-8 Rules, rr. 97-100. On. 1914, ss. 30-36; 1911 Rules, r. 80.

[32] I. 1891, s. 40; 1910 O. 4, r. 1, sch. fees 16; Bro. & Gl. 58.

[33] *Wilson* v. *McIntosh*, [1894] A. C. 129.

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powers to be negatived or modified by agreement even in the Leeward Islands and Trinidad-Tobago. With the aid of this principle, and the general principle of preserving substantially property rights as far as possible,[34] and also of cases (other than those relating specially to mortgages) on the subject of statutory forms, the enactments above referred to may perhaps be summed up by saying that the prescribed form of mortgage must be followed in substance, though verbal identity is by no means required.[35] As to what is substantial compliance—which is of course the difficulty—it may at least be said that an instrument does not substantially comply with, or follow in substance, the statutory form, unless it is on its face drafted with reference to the provisions of the statute under which it is to be registered.[36] Even the insertion of entirely new clauses would not of itself make an instrument unregistrable, so long as it was not "inconsistent with the principles upon which the register is to be kept."[37] Such an inconsistency occurs when the statutory instrument purports to include land that is not on the register at all.[38]

Variations of the statutory form of mortgage may be by way of either alteration or addition; the latter give rise to greater difficulties of construction.

The mortgage must purport to operate by way of charge on, and not conveyance of, the registered title;[39] "the charge is an essential feature of a mortgage" and "must always be present."[40] But the

[34] Aust. Torr. Syst. 803; Can. Torr. Syst. 365.

[35] *Ex p. Hamilton* (1865) 3 S. C. (N. S. W.) 311, 317; *Shore* v. *Green* (1890) 6 Man. R. 322; *Crowley* v. *Templeton* (1914) 17 C. L. R. 457. As to discretion vested in registry officers with respect to mere form of instruments, see Aust. Torr. Syst. 905; in South Australia, Papua, and Manitoba, see the statutes: S. A. 1886, s. 247; P. 1913, s. 126B; M. 1913, s. 91. Some English cases on statutory forms are cited and quoted from in Can. Torr. Syst. 106.

[36] *Shore* v. *Green* and *Crowley* v. *Templeton*, *supra*. In these cases leases were held unregistrable as not being in statutory form, and they well illustrate the permissible limits of variation, since leases are treated in this respect with greater liberality than other instruments; instances of this are *Bucknall* v. *Reid* (1876) 10 S. A. R. 188, and *Baker's Creek G. M. Co.* v. *Hack*. (1894) 15 N. S. W. Eq. 207. As to these cases, see Aust. Torr. Syst. 879, which appears to be referred to in *Smith* v. *National Trust Co.* (1912) 45 Can. S. C. R. 618, at p. 667.

[37] This statement seems justified by *Brown* v. *Wellington and Manawatu Ry. Co.* (1899) 17 N. Z. R. 471; *Bucknall* v. *Reid* and *Baker's Creek G. M. Co.* v. *Hack*, *supra*; *Mahony* v. *Hosken* (1912) 14 C. L. R. 379. The quoted words are from Eng. 1903-8 Rules, r. 100 (p. 210, *ante*).

[38] *Horne* v. *Horne* (1906) 29 N. Z. R. 1208.

[39] *Re Spokane and Eastern Trust Co.'s Mortgage* (1910) 15 West. R. 637 (Al.), partly stated in Can. Torr. Syst. 285.

[40] *In re Goldstone's Mortgage* [1916] N. Z. R. 489, 500.

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charge must be of the proper kind, appropriate for securing a debt, charging it on the land directly and not merely by agreeing to do so.[41]

If the instrument did purport to operate by way of conveyance instead of charge, it would usually be refused registration or subsequently declared inoperative. An apparent exception has occurred (in New South Wales) in the case of a mortgage by the donee of a power of appointment over the fee simple; the instrument, though it might have been construed as purporting to vest the fee simple by way of mortgage in the mortgagee, was held to operate by way of charge only, and to constitute a valid statutory mortgage.[42] This is only likely to occur in jurisdictions in which the creation and execution of registered powers of appointment is expressly authorized by the statutes, viz.: New South Wales, Tasmania, Victoria, Western Australia, New Zealand, Trinidad-Tobago, Jamaica.[43] In Victoria, Western Australia, and Jamaica mortgages by donee of a power are expressly provided for.[44]

The "contractual part" of the mortgage can be more readily altered than the charging part. A wide departure from the prescribed form is permissible, even though this "in many cases must amount to a complete deletion of" the "contractual part" of the form,[45] and "express covenants and powers of an entirely different character may be introduced."[46] The prescribed forms "are good servants but bad masters," and should be used "to facilitate, and not to hinder, dealings with land."[47] Thus, there is no objection to an instrument already on the register being referred to and incorporated in the mortgage instrument, or to the terms of the prior instrument being varied by apt words of agreement in the later

[41] *Re Rumeley Co.* (1911) 17 West. R. 160 (Sas.), partly stated in Can. Torr. Syst. 103, 108.

[42] *Ex p. Newcastle Build. Co.* (1905) 5 S. R. (N. S. W.) 237. Another example of a similar mortgage occurs in *Moir* v. *Loxton* (1913) 13 S. R. (N. S. W.) 143. In both cases the donee of the power was a married woman registered as proprietor of a life estate.

[43] N. S. W. 1900, s. 99; Tas. 1862, s. 86; V. 1915, s. 123; W. A. 1893, s. 84; Tr. 1902, s. 62; J. 1888, s. 65. And see Aust. Torr. Syst. 940; Own. & Inc. 224.

[44] V. 1915, s. 150; W. A. 1893, s. 110; J. 1888, s. 83.

[45] *In re Goldstone's Mortgage* [1916] N. Z. R. 489, 500; and see *Crowley* v. *Templeton* (1914) 17 C. L. R. 457, 466.

[46] *Smith* v. *National Trust Co.* (1912) 45 Can. S. C. R. 618, 667; and see p. 641 as to the "economic" identity of the statutory mortgage with, notwithstanding "juridical" differences, the ordinary mortgage (quoted in Can. Torr. Syst. 289, 290). See also *Mutual Life Ass. Co.* v. *Douglas* (1918) 57 Can. S. C. R. 243, as to identity of English and civil law mortgages.

[47] *Perpetual Executors Assoc.* v. *Hosken* (1912) 14 C. L. R. 286, 289, 290.

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instrument.[48] And a contributory mortgage, or even a single instrument containing two mortgage transactions, is valid and registrable.[49] Mortgagees who are in fact trustees of the mortgage money may also refer to this in the mortgage instrument by stating that the money advanced is trust money held by them under a named deed of settlement.[50] Nor is there any objection to the mere statement that the mortgage money is collaterally secured by another named mortgage over unregistered land, though this collateral deed should not be expressly "deemed to be incorporated with" the statutory mortgage.[51] And in general unregistered instruments should not be incorporated by reference; the statutory mortgage may thereby either be made unregistrable,[52] or the incorporated instrument may not form part of the mortgage.[53]

Variations by way of addition open a wider range of discussion. They usually consist of clauses modifying or negativing rights conferred by the statutes upon the owner as against the mortgagee. Some of these rights cannot be entirely negatived, and cannot be modified beyond a certain limit. But on the threshold of the subject is the question whether any, and if any what, provisions can be introduced into the statutory mortgage which have not express reference to the contents of the instrument as supplied by the statute itself. It is quite clear that some provisions of this kind can be introduced.[54] The principle of permitting certain alterations in the prescribed form applies equally to certain additions that are commonly the subject of agreement between the parties in ordinary mortgages, and in the majority of the statutes the forms themselves contemplate the insertion of additional clauses,[55] while some of these

[48] *In re Goldstone's Mortgage* [1916] N. Z. R. 19, 489.

[49] *Ex p. Roxburgh* (1868) 1 Q. S. C. R. 201; *Drake* v. *Templeton* (1913) 16 C. L. R. 153.

[50] *De Cordova* v. *Registrar of Titles* (1910) Jamaica, unreported.

[51] *De Cordova* v. *Registrar of Titles, supra; Re North-West Telephone Co.* (1909) 12 West. R. 300 (Sas.); Aust. Torr. Syst. 947.

[52] *Re North-West Telephone Co., supra.*

[53] *Wilkin* v. *Deans* (1888) 6 N. Z. R. 425; *Re Kelly and Colonial Invest. Co.* (1906) 3 West. R. 62 (N. W. T.).

[54] Possibly Leeward Islands may be an exception. The prescribed form contains no covenants, and does not contemplate the insertion of special clauses: L. Is. 1886 (1914), sch. B f. 8.

[55] In the nine Australasian jurisdictions the prescribed form of mortgage permits the insertion of "special covenants," in Federated Malay States "special stipulations," in Ontario "covenants which are agreed to and are not implied under the Act or otherwise." In England certain named "special stipulations may be added at the end of the charge"; and see Eng. 1903-8 Rules, r. 97. Only in Ireland and Leeward Islands does the prescribed form contain no reference to additional clauses.

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additions have received judicial sanction.[56] Thus, it is a common practice in those jurisdictions in which the statutes make no reference to the custody of the certificate of title, to insert a clause providing that the mortgagee shall be entitled to this custody, and there seems to be no objection to this, though the mortgagee can usually be compelled to produce the certificate of title for the purpose of other transactions being registered.[57] In New Zealand the statute gives the mortgagee the right of custody, though he is still bound to produce the certificate of title for purposes of registration, and in England the mortgagee may stipulate for this right,[58] but in Leeward Islands, Manitoba, Saskatchewan, Alberta, and North-West Territories,[59] the statutes expressly deprive the mortgagee of the right.

Covenants to pay life insurance premiums,[60] and covenants for payment of principal or interest by guarantors who are not the owners of the mortgaged property,[61] may be inserted without rendering the mortgage unregistrable.

In England a practice has grown up of inserting in the statutory mortgage of freehold land a conveyance in fee;[62] this has no effect on the registered title, but only operates as an unregistered conveyance would. The practice seems both unnecessary and out of harmony with the principles of registration of title, and is largely due to the difficulties created by the provisions for "possessory" registered title and unregistered transactions.[63] It seems unlikely that the practice will extend beyond England.

Clauses by which the owner attorns tenant to the mortgagee are often inserted, and these are referred to later on.

Very special clauses are sometimes inserted in mortgages of leases or leasehold land. A clause, by which the owner (a lessee for five years) appointed the mortgagees his attorneys to take possession on default and among other things sub-let, was assumed to be valid

[56] Aust. Torr. Syst. 879, 946.

[57] Aust. Torr. Syst. 923, 948; Bro. & Gl. 136, 187; V. 1915, s. 166; W. A. 1893, s. 127; *Registrar-General* v. *Wright* (1917) 23 C. L. R. 214; *Anthony* v. *Speed* [1917] S. A. R. 110.

[58] N. Z. 1915, s. 121; *In re Wright* (1894) 12 N. Z. R. 585. Eng. 1897, s. 8; 1903-8 Rules. rr. 267, 268; Own. & Inc. 160.

[59] L. Is. 1886 (1914), s. 49; M. 1913, s. 127; Sas. 1917, s. 101; Al. 1906, s. 71; Can. 1906, s. 97.

[60] *Wiltse* v. *Excelsior Life Ins. Co.* (1916) 34 West. R. 16, 1114.

[61] *Wells and Johns* v. *Registrar-General* (1909) 29 N. Z. R. 101; *Perpetual Executors Assoc.* v. *Hosken* (1912) 14 C. L. R. 286. In *Moir* v. *Loxton* (1913) 13 S. R. (N. S. W.) 143, 18 C. L. R. 360) such a guarantee was contained in a separate deed.

[62] Br. & Sh. 398; *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631, 657, 658.

[63] Own. & Inc. 102, 192, 197, 201; Bro. & Gl. 152, 153.

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in one case, though the whole instrument was said to be "a most ususual mortgage form."[64]

In mortgages to brewers beer covenants are often inserted, and these covenants appear to be valid to the same extent as in the case of unregistered land, and the mortgages containing them appear to be registrable.[65]

Judicial opinion is divided as to the extent to which the mortgagee can have vested in him effectively powers which, in the ordinary mortgage by conveyance, depend for their effectiveness upon some estate in—that is, ownership of—the property being made over to the mortgagee. The difficulty is illustrated by questions relating to powers of leasing and sale.

Only in South Australia, Manitoba, Saskatchewan, and Alberta,[66] is a power to lease given expressly by the statutes to the mortgagee. In England, Ireland, and Ontario,[67] the statutes enact in effect that leasing powers may be conferred by the owner on the mortgagee, other statutes giving this power being embodied by reference in the registration statute—in England and Ireland the Conveyancing Acts, in Ontario the Short Forms of Mortgage Act. The Leeward Islands statute is singular in its provisions, and apparently only short leases can be made by a mortgagee in possession.[68]

In North-West Territories the owner may covenant in statutory form that the mortgagee may enter and have quiet possession on default.[69] In Trinidad-Tobago the statute gives a mortgagee all rights and powers which he would have had if the "legal estate" had been conveyed to him by a mortgage of unregistered land.[70] In the remaining jurisdictions the statutes themselves give the mortgagee the right to take possession on default—"to enter into possession by receiving the rents and profits" is the phrase used in all these eleven jurisdictions and also in Manitoba (referred to above). In Victoria, Western Australia, and Jamaica, and also in Manitoba (already referred to), this right of taking possession is supplemented by an enactment conferring on a mortgagee (in Victoria and Manitoba a "first mortgagee") the same rights as he

[64] *Seabrook* v. *McMullan* (1908) 10 W. A. R. 47.

[65] See *Bucknall* v. *Reid* (1876) 10 S. A. R. 188 (lease); *Mahony* v. *Hosken* (1912) 14 C. L. R. 379 (non-mortgage charge). An opinion against the registrability of such a mortgage was expressed in *Staples* v. *Mackay* (1893) 11 N. Z. R. 258.

[66] S. A. 1886, s. 137; M. 1913, s. 118; Sas. 1917, s. 108; Al. 1906, s. 62A.

[67] Eng. 1875, s. 25; 1897, s. 9; Own. & Inc. 195, 235. I. 1891, s. 40 (4). On. 1914, ss. 31 (2), 33.

[68] L. Is. 1886 (1914), ss. 72, 87.

[69] Can. 1906, s. 109, sch. f. U 3.

[70] Tr. 1902, s. 75.

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would have had if the "legal estate" had been vested in him with a right in the owner of quiet enjoyment until default.[71] This supplemental enactment as to the "legal estate" is absent from New South Wales, Queensland, South Australia, Tasmania, Papua, New Zealand, Fiji, and Federated Malay States.[72]

The omission in the statutes of these thirteen jurisdictions (including North-West Territories and Trinidad-Tobago) of an express leasing power in the mortgagee, and of a right in the owner to confer such a power upon him, has been partially made good by decisions to the effect that the relationship of landlord and tenant can be created between the mortgagee and owner, and that the statutory power to take possession includes a power of leasing. Thus, in New South Wales it is held that a mortgagee taking possession by receiving the rents and profits may lease the land just as if the mortgage had been effected "by a conveyance of the legal estate,"[73] and the decision would apply à fortiori in those jurisdictions—Victoria, &c.—in which the mortgagee is given by statute the rights he would have had by the "legal estate" being vested in him. In several jurisdictions it is held that a clause by which the owner attorns tenant to the mortgagee is valid,[74] and that the statutory mortgage ipso facto creates the relationship of landlord and tenant as under a mortgage by conveyance.[75] In the New Zealand, Saskatchewan, and Alberta cases cited, the tenancy is treated as one by estoppel only, and not a "real tenancy" available against executions and the goods of strangers, but in the Victorian cases there is no suggestion that the tenancy is other than an ordinary tenancy as by demise.[76]

[71] V. 1915, ss. 151, 156; W. A. 1893, ss. 111, 116; J. 1888, ss. 84, 89; M. 1913, ss. 114, 116.

[72] N. S. W. 1900, s. 60; Q. 1861, s. 60; S. A. 1886, s. 137; Tas. 1862, s. 56; P. 1913, s. 52; N. Z. 1915, s. 105; Fi. 1876 (1906), s. 60; F. M. S 1911, s. 44.

[73] *Finn* v. *London Bank of Australia* (1898) 19 N. S. W. 364. The section (s. 58) referred to in the report is now N. S. W. 1900, s. 60.

[74] *Jellicoe* v. *Wellington Loan Co.* (1886) 4 N. Z. S. C. 330; *Hyde* v. *Chopin Co.* (1916) 33 West. R. 559 (Al.); *Rollefson Bros. Co.* v. *Olson* (1915) 31 West. R. 157 (Sas.); *First National Bank* v. *Cudmore* [1917] 2 W. W. R. 279 (Sas.); Aust. Torr. Syst. 948; Can. Torr. Syst. 302-304.

[75] *Commercial Bank* v. *Breen* (1889) 15 V. L. R. 572 (s. 93 there referred to being now V. 1915, s. 156); *Farrington* v. *Smith* (1894) 20 V. L. R. 90; *Equity Trustees Co.* v. *Lee* [1914] V. L. R. 57 (s. 124 reference to in these two cases being now V. 1915, s. 156); *Vousden* v. *Hopper* (1911) 16 West. R. 294 (Sas.); Aust. Torr. Syst. 961. See notes 70, 71.

[76] The Victorian cases were all concerned with the right of a mortgagee to recover possession of the land from the owner. In New Zealand the mortgagee has, on the owner's default, the same remedies "as are by law given to a landlord against a lessee or tenant whose term is expired or rent in arrear": N. Z. 1915, s. 118.

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If the mortgagee's lease is to be upheld as included in the statutory power of taking possession, it would seem that possession must first have been taken in accordance with the provisions of the statutes; the New South Wales case cannot be regarded as an authority that a purely conventional power of leasing can be conferred. It was however held in the Saskatchewan case that a conventional power of leasing, operating independently of the statutory power existing in that jurisdiction—as also in Manitoba and Alberta—could be conferred.[77]

The exercise of a mortgagee's power of sale, in the case of unregistered land, depends for its complete efficiency upon his having the legal ownership of the property. Since under a statutory mortgage the mortgagee does not obtain the legal ownership, the question arises whether a conventional power of sale—that is, one operating by express agreement between the parties and not conferred by the statutes—can still be conferred by the owner, or whether the mortgagee can only have the benefit of any power of sale that may be conferred by the statutes. In some jurisdictions the power of sale conferred by the statutes is of the most ample kind. In others the mortgagee has not complete power in himself to sell, but a sale can only be carried out under judicial authority.

The widest power of sale is conferred in England, Ireland, Ontario, and Trinidad-Tobago.[78] The scheme in all four jurisdictions (though the language of the statutes varies) is to confer on the mortgagee a power of sale which can be of any degree of stringency, exactly as though the land were unregistered and had been conveyed by way of mortgage.

In the nine Australasian jurisdictions (except Fiji), and also in Jamaica,[79] the normal power of sale contemplated by the statutes provides for notice of default being given, and for two periods of default expiring, before sale can be effected—a month being the typical period; but besides the general statutory right to negative and modify covenants, special authority is given in the case of mortgages to abridge these periods of default, so that the statutory power of sale in these jurisdictions can be made practically as stringent as in England, &c.

[77] *Rollefson Bros. Co.* v. *Olson, supra.*

[78] Eng. 1875, ss. 22, 26. 27; 1897, s. 9. I. 1891, s. 40. On. 1914, ss. 30, 34. 35. Tr. 1902, ss. 75, 77; the "Conveyancing Ordinance" (1902, No. 72), impliedly embodied in these sections, is nearly a transcript of the English Conveyancing Acts, the relevant sections being ss. 21-24 answering to ss. 19-22 of the English Act of 1881.

[79] N. S. W. 1900, ss. 57-59; Q. 1861, ss. 57-59; S. A. 1886, ss. 132-134; Tas. 1862, ss. 53-55; V. 1915, ss. 146-148, 150; W. A. 1893, ss. 106-108, 110; P. 1913, ss. 48, 50, 51; N. Z. 1915, ss. 103, 109, sch. 4; J. 1888, ss. 80, 81, 83.

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In Manitoba, Saskatchewan, and Alberta,[80] the power of sale can be exercised by the mortgagee, but only under judicial direction; as in Australia, notice and two periods of default are provided for, but the notice must be filed in the registry, and the periods of default cannot be abridged—though they may be lengthened.

In Fiji, Federated Malay States, Leeward Islands, and North-West Territories,[81] no power of sale is conferred on the mortgagee himself, but proceedings must be taken to obtain a judicial sale. In the first three a statutory procedure is provided for, but in North-West Territories it is contemplated that the procedure shall be by ordinary mortgagee's action for sale, foreclosure, &c. In Fiji and Federated Malay States provision is made for notice and two defaults, with power to abridge the periods of default, as in Australia, but in North-West Territories the statute is quite silent on all these points. In Leeward Islands a rigid procedure is laid down and no provision made for departure from it. In all four jurisdictions the express provisions of the statutes seem to indicate clearly that a registered owner could not confer upon his mortgagee any power of sale which would entitle the latter to sell and give a registrable title to a purchaser without taking the proceedings for sale directed by the statutes. In Leeward Islands and North-West Territories the word "shall" is used, but the expression "it shall be lawful" in Fiji and Federated Malay States appears to be equally "peremptory and exclusive," since no other mode is authorized."[82]

In Manitoba, Saskatchewan, and Alberta, this principle of construction, excluding the validity of any power of sale not authorized by the statutes and ensuring that "the benefit of the Act" shall be "dependent upon its requirements being satisfied,"[83] has been authoritatively applied; a power of sale omitting all mention of notice and periods of default, and carried out without reference to any judicial directions, is invalid for the purpose of enabling the purchaser from the mortgagee to be registered as owner.[84]

[80] M. 1913, ss. 118-121A; Sas. 1917, s. 109; Al. 1906, s. 62A (6).

[81] Fi. 1876 (1906), ss. 63, 64; F. M. S. 1911, ss. 46, 47; L. Is. 1886 (1914), ss. 71-75, sch. B f. 14; Can. 1906, s. 99; and see Can. Torr. Syst. 294 *et seq.*

[82] See *Crowley* v. *Templeton* (1914) 17 C. L. R. 457, 463, as to "may" and "shall."

[83] *Crowley* v. *Templeton*, *supra*, at p. 466.

[84] *Smith* v. *National Trust Co.* (1912) 45 Can. S. C. R. 618. The decision was a three to two majority affirming the Manitoba Court (17 West. R. 354); a judicial opinion bas been expressed to the effect that tbe case did not decide that a valid conventional power of sale could not be conferred on the mortgagee, but only that the power in question was not thus effective: *Rollefson Bros. Co.* v. *Olson* (1915) 31 West. R. 157, 161 (Sas.).

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In Jamaica and the Australasian jurisdictions (other than Fiji) the same principle seems applicable, but is less prominent in practice owing to the greater liberty accorded to the mortgagee, and the wider limits of modification permitted. Powers of sale have been held valid when made exercisable without any notice to the owner,[85] and the periods of default may be, and not uncommonly are, cut down to one day. Nevertheless, even in these jurisdictions a power of sale to be valid must be a modification in some way of the statutory power, and not altogether independent of the statutory provisions.[86]

In England, Ireland, Ontario, and Trinidad-Tobago, the statutory power is made so wide that the question of the validity of any power of sale given to a mortgagee on the ground of its not being authorized by the statutes is not likely to arise. Nevertheless in theory the principle above stated appears to apply—that such a power can only be valid as a modification of the statutory power, and not as operating independently altogether of the statutes. In England and Ontario a "power of sale" simply is conferred by the registration statutes, and this is supplemented by the incorporation in these statutes of the power of sale conferred on mortgagees of unregistered land by other statutes of general application, which latter statutes permit the widest possible variation of the power of sale given by them. In Ireland the only difference is that no actual power of sale purports to be conferred by the registration statute, but the Conveyancing Acts are incorporated. In Trinidad-Tobago the general statute—the Conveyancing Ordinance—is impliedly but clearly embodied, and the mortgagee is given the rights he would have had "under an instrument purporting to convey the legal estate" in unregistered land.

The general conclusion seems to be that while it is possible that a conventional or non-statutory power of leasing may eventually be upheld by the courts as valid, when expressly conferred by an owner upon his mortgagee in a statutory mortgage, it is improbable that a similar power of sale will be upheld. There is, however, a possibility that under some circumstances a non-statutory power of sale, though ineffective to vest any legal right of registration in a purchaser from the mortgagee, might be treated as an equitable right to which the court would give effect upon the application of the

[85] *Public Trustee* v. *Morrison* (1894) 12 N. Z. R. 423; *Ex p. Newcastle Build. Co.* (1905) 5 S. R. (N. S. W.) 237, 238. And see *Skinner* v. *Cribb* (1878) 5 Q. S. C. R. 31, 38; *Campbell* v. *Commercial Bank* (1879) 2 N. S. W. 375 (P. C.).

[86] *National Bank of Australasia* v. *United Hand-in-Hand Co.* (1879) 4 A. C. 391, 407.

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mortgagee or his purchaser.[87] The question remains, with respect to the legal rights conferred by the statutory power of sale, how far this power may be varied by additions to the mortgage instrument while still preserving statutory rights to the mortgagee.

The statutes in most instances speak plainly for themselves. Thus, in England, Ireland, Ontario, and Trinidad-Tobago, no addition by way of varying the statutory power of sale would be invalid if it were valid under the general law and apart from the registration statutes. In Manitoba, Saskatchewan, and Alberta, not only must notice of intention to sell be given to the owner, but the notice must be filed at the registry; the period of default, too, can only be varied by being lengthened, and in general the sale must be supervised by the registrar. Apparently these provisions of the statutes cannot be waived, nor can an owner contract himself out of the statute.[88] In the Australasian jurisdictions other than Fiji, and in Jamaica, the periods of default are by the statutes permitted to be altered by being either lengthened or abridged, and the courts have held that the requirement of notice may be altogether waived and the right to sell made to arise immediately on default.[89] Any variation, not amounting to an abrogation, of the owner's right to notice, &c., must of course be strictly complied with to make the sale valid.[90]

There seems to be no reason to doubt that any attempt in a statutory mortgage to restrict the owner's right of redeeming the property on payment of the debt would be as invalid as if it related to unregistered land.[91]

To constitute a complete security the mortgage must be registered (*ante,* p. 206), but a statutory instrument may be operative for many purposes as a contract between the parties (*ante,* p. 111, Chap. IV, Sect. 5). Thus, it seems clear that an action could be brought on the covenants for payment, when these are expressed in the instrument itself, although the mortgage was not registered; and the covenants would be just as binding, even though the covenantor was not the registered owner at the time of entering into

[87] *Smith* v. *National Trust Co., supra,* at pp. 621, 662 (dissenting judgment of Idington and Anglin, JJ.); *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631, 657.

[88] *Smith* v. *National Trust Co., supra;* 17 West. R. at p. 363, where it is said that "modification cannot go so far as to dispense with the requirements of" M. 1913, ss. 118, 119.

[89] Cases in note 85. And see *Rollefson Bros. Co.* v. *Olson, supra.*

[90] *Van Damme* v. *Bloxam* (1875), 9 S. A. R. 27; *National Bank of Australasia* v. *United Hand-in-Hand Co., supra; Campbell* v. *Commercial Bank, supra,* the case referred to in 4 A. C. at p. 407.

[91] See *In re Burton* (1901) 27 V. L. R. 437, 441; Aust. Torr. Syst. 946.

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them by executing the instrument of mortgage.[92] But it seems equally clear that such an action could not be brought on an unregistered instrument if the covenant for payment were merely implied by the statute and not expressed in the instrument.[93]

So, where the mortgage instrument contains a special clause authorizing possession to be taken, the mortgagee may enter before registering his mortgage, and his right to possession then relates back to the execution of the instrument, not its registration.[94]

Although the statutory power of sale could not be completely exercised unless the mortgage were registered, the mortgagee may take the preliminary steps of giving notice of default or demand for payment, and notice of intended sale when required by the provisions of the mortgage instrument, before registration is effected, and these notices will be valid as between the parties for the purpose of making the sale under the registered mortgage effective.[95]

A condition of the admission to registration of a statutory mortgage—and this applies to other statutory instruments[96]—is that it has been executed as required by the statutes.[97] Only in England and Ireland need the statutory mortgage be under seal. The prescribed form of mortgage in other jurisdictions is under hand only, though the form of combined transfer and charge in Queensland and Papua is under seal.[98] Attestation is however required in every jurisdiction; in some cases the attestation must be by an official witness, and in some cases an affidavit or declaration or certificate as to the execution is required. These statutory require-

[92] *Mathieson* v. *Mercantile Finance Co.* (1891) 17 V. L. R. 271; *Seabrook* v. *McMullan* (1908) 10 W. A. R. 47; *Mercantile Build. Co.* v. *Murphy* (1888) 4 W. N. (N. S. W.) 105.

[93] This might happen in England or Ontario, and possibly in Leeward Islands; in other jurisdictions an express covenant is a necessary part of the prescribed form. The statutory covenants are only "implied" in England and Ontario when a "registered charge is created": Eng. 1875, s. 23; On. 1914, s. 30. And see Aust. Torr. Syst. 908; *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575.

[94] *Seabrook* v. *McMullan*, *supra*.

[95] *Mathiesan* v. *Mercantile Finance Co.*, *supra*; *Seabrook* v. *McMullan*, *supra*, at p. 56. As to "demand" mortgages, see under "Power of Sale," sub-sect. 2. *post*.

[96] British Columbia and British Honduras are not included in this sub-section (*ante*, pp. 192, 205), since the statutory mortgage does not form part of their systems. There are however in the British Columbia statute elaborate provisions for proof of due execution of instruments as a condition of their registration: B. C. 1911, ss. 77-85A. In British Honduras the provision on this point is meagre: B. H. 1914, ss. 35, 37.

[97] As to the execution and effect of statutory instruments, see Aust. Torr. Syst. 902-918; Can. Torr. Syst. 111-115, 234; Own. & Inc. 183.

[98] Aust. Torr. Syst. 907; Can. Torr. Syst. 234; Q. 1877, s. 24, sch. T; P. 1913, s. 60, sch. 7.

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ments however only affect the registrability of the instrument, and not its intrinsic value as an equitable assurance or contract between the parties;[99] the utmost that can be said is that the possession of an instrument ready for registration might give a better equity than if some further formality were necessary to make the instrument registrable.[1]

In England the instrument of mortgage must be executed as a deed, and must be attested by a witness who must add his address and description; in Trinidad-Tobago no sealing is required, but a similar attestation is sufficient, and the instrument must also (unless executed abroad) bear the signature of a legal practitioner "as having prepared such instrument."[2] In New South Wales and New Zealand the attestation of a single witness is sufficient, though in the case of New Zealand the witness must (if the execution is in New Zealand) add his address and description; the further provisions of the statutes relate to the verification of the execution, but do not appear to make any particular method of attestation or verification essential.[3] In Leeward Islands any person may be an attesting witness, when the instrument is "executed within the colony," and no "declaration or certificate of such witness" is required, the registrar being given discretion to admit or refuse the instrument for registration if he "has occasion to doubt" the authenticity of the signature; when "executed without the colony," the witness must either be one of the named official persons, or he must prove the execution by his declaration or certificate before one of these official persons.[4] In other than these five jurisdictions attestation by, or verification before, an official person seems to be essential in ordinary circumstances as a condition of registrability.

In Ireland sealing is made necessary, whilst in Ontario sealing is expressly made unnecessary; in Ontario the execution must ordinarily be (the registrar having a discretion), and in Ireland may in certain cases be required to be, verified by affidavit, though in

[99] *Barry* v. *Schmidt* (1913) 13 S. R. (N. S. W.) 639, 643, affd. (*Barry* v. *Heider*) 19 C. L. R. 197; *Nicols and Shepard Co.* v. *Skedanuk* (1913) 25 West. R. 453 (Al.), revg. Court below (24 West. R. 184).

[1] This point of view is rather lost sight of in some of the observations made on the question of attestation in *Barry* v. *Heider*, *supra;* see particularly at p. 204 of the report.

[2] Eng. 1903-8 Rules, rr. 107-109; Own. & Inc. 183. Tr. 1902, s. 119A; 1913, s. 2; as to the other sections (ss. 122, 123) see N. S. W. 1900, ss. 107, 108, as interpreted in *Barry* v. *Heider*, *supra*, at p. 204.

[3] N. S. W. 1900, ss. 36, 107, 108; N. Z. 1915, ss. 35, 168-171, 176. *Barry* v. *Schmidt* and *Barry* v. *Heider*, *supra*.

[4] L. Is. 1886 (1914), ss. 147, 148.

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neither jurisdiction is any particular witness or method of attestation necessary.[5]

In Manitoba, Saskatchewan, Alberta, and North-West Territories,[6] the execution is required to be verified by the witness' affidavit, and proof of the executant's age may also be required; the provisions in the three latter jurisdictions are precise as to this, and enumerate the officials before whom the affidavit is to be made. In Alberta, however, the Court may order registration notwithstanding defective proof of execution (s. 103).

In Federated Malay States the statute enacts expressly that the instrument "shall be attested by one of the following persons," according to the place of execution, and a list of official witnesses is given.[7] This seems to be the only case of attestation by an official witness in person being required without exception.

In the remaining eight jurisdictions—Queensland, South Australia, Tasmania, Victoria, Western Australia, Papua, Fiji, Jamaica[8]—the attesting witness must either be one of certain named official persons, or must appear before one of such persons and verify the execution. Only in South Australia does the statute in terms permit the registrar to dispense with the proof of execution in special cases (s. 269).

So far execution and attestation under ordinary circumstances has been referred to. It is necessary to touch on the special cases of execution by attorney under power, by corporations, by married women, and by illiterate persons.

In England, Ireland, and Ontario,[9] execution by attorney is dealt with by rules only. The power of attorney must be produced, and in some cases filed or registered, and evidence furnished of the

[5] I. 1910 O. 3, rr. 6, 8; O. 4, r. 1, ff. 9-11; Bro. & Gl. 31, 236. On. 1914, ss. 31 (2), 102; 1911 Rules, rr. 27, 64, 76.

[6] M. 1913, s. 94; Sas. 1917, ss. 56, 57, 209; Al. 1906, ss. 102, 103, 145; Can. 1906, ss. 140, 141, 195. See Can. Torr. Syst. 111; *Nicols and Shepard Co.* v. *Skedanuk* (1913) 24 West. R. 184, 25 *ib.* 453 (Al.).

[7] F. M. S. 1911, ss. 21, 71. Some mistake seems to have been made in adapting s. 71 from the Fiji statute, as the word "colony" is insensible, unless it refers to the adjacent Crown colony of the Straits Settlements.

[8] Q. 1861, ss. 56, 115, and 1877, s. 5; S. A. 1886, ss. 56, 267-269; Tas. 1862, s. 35, and 1886, s. 29; V. 1915, s. 191; W. A. 1893, s. 145; P. 1913, ss. 114, 115; Fi. 1876 (1906), ss. 35, 94, 95; J. 1888, s. 112. And see Aust. Torr. Syst. 909. The word "shall" occurs in all these enactments, and this distinguishes them from New South Wales and New Zealand, as to which see *Barry* v. *Heider* (1914) 19 C. L. R. 197, 204. In Victoria and Western Australia special statutes deal with execution abroad during the war: V.—Execution of Instruments Act 1915 (No. 2757); W. A.—Execution of Instruments Act 1916 (No. 8).

[9] Eng. 1903-8 Rules, r. 110; Own. & Inc. 183. I. 1910 O. 3, r. 7; Bro. & Gl. 236. On. 1911 Rules, rr. 58, 59.

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power being still effectual. In the other jurisdictions powers of attorney are the subject of express enactment in the statutes. In every one of these, except Manitoba,[10] a statutory form of power of attorney is provided for. In Leeward Islands[11] the statutory form is only for use when the instrument is executed in the colony; the statute also differs from others in merely providing for the form of instrument and being silent as to its registration, revocation, &c. In Victoria,[12] Western Australia, Jamaica, and Federated Malay States,[13] the statutory form only is expressly authorized, though it seems to be implied that powers in ordinary form may be used as well since in these jurisdictions the requirement of attestation applies to "instruments and powers of attorney";[14] but some reference to registered land should be made in a power intended to be exercised in connexion with land on the register.[15] The enactment last mentioned appears (in a modified shape) in the Fiji statute,[16] where an ordinary as well as a statutory form is also referred to.

The scheme in these five last-mentioned jurisdictions, and in Manitoba and the remaining jurisdictions, is that the power of attorney shall be registered, or a copy filed in the registry,[17] that notice of revocation shall also be registered, and that transactions registered prior to notice of revocation being registered are to be valid. In all these remaining jurisdictions (except South Australia,[18] where it is distinctly implied) the statutes expressly permit ordinary as well as statutory forms of power to be used. In New Zealand and Trinidad-Tobago[19] the ordinary conveyancing and property statutes are referred to as applying to powers of attorney that deal with registered land, but this seems to be implied

[10] M. 1913, s. 166; Can. Torr. Syst. 402.

[11] L. Is. 1886 (1914), s. 146.

[12] V. 1915, ss. 189, 190; Aust. Torr. Syst. 545, 912. These two sections (ss. 189, 190) re-enact ss. 150 and 151 of V. 1890. Sects. 187-204 of the Instruments Act 1890 (No. 1103), together with ss. 54 and 55 of the Conveyancing Act 1904 (No. 1953, taken from the English Conveyancing Acts), are now re-enacted as ss. 206-227 of the Instruments Act 1915 (No. 2672).

[13] W. A. 1893, ss. 143, 144; Aust. Torr Syst. 634, 912. J. 1888, ss. 110, 111. F. M. S. 1911, ss. 58, 59.

[14] V. 1915, s. 191; W. A. 1893, s. 145; J. 1888, s. 112; F. M. S. 1911, s. 71, and Powers of Attorney Enactment 1912 (No. 1), s. 3.

[15] *Clazy* v. *Registrar of Titles* (1902) 4 W. A. R. 113.

[16] Fi. 1876 (1906), ss. 76, 94.

[17] Registration, and the entry of a note of the power on the register, are not the same thing: *Registrar of Titles* v. *Carey* (1905) 9 Str. Sett. R. Appx. 35 (F. M. S.).

[18] S. A. 1886, ss. 155-160.

[19] N. Z. 1915, ss. 158-163; Tr. 1902. ss. 87, 88, and Powers of Attorney Ordinance 1914 (No. 1). The New Zealand general enactments are ss. 100-103 of the Property Law Act 1908 (No. 152).

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in other jurisdictions, though in Queensland and Papua [20] the enactments differ from all others and the registrar is expressly relieved of the necessity for requiring evidence of non-revocation. In New South Wales,[21] the statutory power contains the declaration usually inserted in every ordinary power governed by New South Wales law, but there is no such reference to the general law in the statutes of Tasmania or Fiji,[22] nor in those of Saskatchewan, Alberta or North-West Territories.[23] In some jurisdictions [24] the general statutes on powers of attorney contain references to the registration statutes.

The statutory forms of power of attorney, like other statutory instruments, are not under seal; in New Zealand [25] it is enacted that sealing is not necessary. In jurisdictions in which a power of attorney does not require actual registration, but only to be noted on the register after a copy has been filed or deposited, it need not apparently, in the absence of express legislation, be attested in the same manner as registrable instruments. Powers of attorney are, however, placed on the same footing in this respect as registrable instruments in Victoria, Western Australia, Jamaica, Fiji, and Federated Malay States, and require special attestation.[26]

In most jurisdictions the execution of statutory instruments by corporations is expressly referred to; in some statutes the subject is not mentioned at all. In South Australia, Victoria, Western Australia, New Zealand, and Jamaica,[27] the statutes expressly enact that the affixing of the common seal shall be equivalent to signature, but this would seem to be implied without such express enactment.[28] In Western Australia, Victoria, and Jamaica, the seal of the attorney of a corporation whose head office is out of the jurisdiction is to be deemed the common seal of the corporation, and in New Zealand execution may be by attorney; this also would seem to be

[20] Q. 1861, ss. 104, 107, 108, and 1877, s. 13; P. 1913, ss. 105-107.

[21] N. S. W. 1900, ss. 88, 89, sch. 12; Aust. Torr. Syst. 127, 912.

[22] Tas. 1862, ss. 70, 75; Aust. Torr. Syst. 440. Fi. 1876 (1906), ss. 76, 77.

[23] Sas. 1917, ss. 125-127; Al. 1906, ss. 72, 73; Can. 1906, ss. 110-113. And see Can. Torr. Syst. 402, since the writing of which the Saskatchewan enactment has been amended.

[24] Trinidad-Tobago—Powers of Attorney Ordinance 1914 (No. 1); Federated Malay States—Powers of Attorney Enactment 1912 (No. 1).

[25] N. Z. 1915, s. 162.

[26] V. 1915, s. 191; W. A. 1893, s. 145; J. 1888, s. 112 (1889, s. 25); Fi. 1876 (1906), s. 94; F. M. S. 1911, s. 71. *Registrar of Titles* v. *Carey* (1905) 9 Str. Sett. R. Appx. 35 (F. M. S.).

[27] S. A. 1886, s. 270; V. 1915, s. 175; W. A. 1893, s. 130; N. Z. 1915, s. 173; J. 1888, s. 99.

[28] *Registrar of Titles* v. *Carey*, *supra*.

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implied. In Western Australia the affixing of the common seal is not only "in lieu of signing," but also of "obtaining the attestation of" an instrument. In New Zealand the affixing of the common seal is "sufficient proof to the registrar" of the authenticity of the instrument, but no indemnity from State funds can be recovered for loss occasioned by "the improper use of the seal of" a corporation.[29] In South Australia, Victoria, and Jamaica, no special attestation would seem to be required, nor in those jurisdictions—Ireland, Manitoba, Leeward Islands, Fiji, Federated Malay States—where nothing at all is enacted as to execution by corporations.[30] In England also there is no such enactment, the rules merely providing for adaptation of prescribed forms to the case of corporations.[31]

In Saskatchewan, Alberta, and North-West Territories [32] instruments under the seal of a corporation are expressly excepted from the ordinary requirement as to attestation; but in Saskatchewan (as in New Zealand) indemnity cannot be recovered for loss through improper use of the seal. In all these jurisdictions—South Australia to Saskatchewan—where no special mode of execution is required by the registration statutes, the seal must of course be affixed in accordance with the corporation's own regulations, and as to this the registrar would be entitled to information; if not duly affixed, registration could apparently be refused.[33]

In New South Wales, Queensland, Tasmania, Papua, and Trinidad-Tobago,[34] a certificate is required from an officer of the corporation that the seal "was affixed by the proper officer, verified by his signature." Only in Ontario is more than this required: there verification by an attesting witness is necessary, and also an affidavit by an officer of the corporation as to the mode of execution.[35] In Tasmania and New Zealand [36] it is enacted that a cor-

[29] N. Z. 1915, ss. 173, 193, which replace N. Z. 1885, ss. 166, 185, cited in *In re Kaihu Valley Ry. Co.* (1890) 8 N. Z. R. 522.

[30] See Aust. Torr. Syst. 915; Can. Torr. Syst. 111.

[31] Eng. 1903-8 Rules, r. 103.

[32] Sas. 1917, ss. 56, 57, 170; Al. 1906, ss. 102, 103; Can. 1906, ss. 140, 141.

[33] A British Columbia case illustrates this: *In re Land Registry Act* (1916) 34 West. R. 466. And see *Registrar of Titles* v. *Carey* (1905) 9 Str. Sett. R. Appx. 35 (F. M. S.), as to the adaptation of a corporation's execution to statutory requirements of signature and attestation; this case was decided under the repealed statute of Selangor, and the corresponding enactment in F. M. S. 1911 (s. 71) is different, though the wording of the repealed schedule is reproduced in F. M. S. 1911, sch. 2, f. D.

[34] N. S. W. 1900, s. 106; Q. 1861, s. 114; Tas. 1862, s. 95; P. 1913, s. 113; Tr. 1902, s. 120.

[35] On. 1911 Rules, r. 60.

[36] Tas. 1886, s. 30; N. Z. 1915, s. 175.

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poration may authorize some person to certify on its behalf the correctness of instruments tendered for registration, &c.

The tender of an instrument for registration also involves, in the case of corporations, some enquiry into its validity, beyond the mere formal execution. An enquiry might indeed be justified when the mortgage is in favour of the corporation, as well as when it is a security over the corporation's own land. The limits of the registrar's right to be satisfied of the propriety of a particular transaction cannot be laid down satisfactorily, as the authorities now stand. If the transaction is altogether beyond the power of the corporation under its constitution, registration could be refused, but apparently not if it were merely doubtful whether the particular transaction falls within the corporation's admitted powers.[37] Only in England is express authority conferred on the registry to require evidence of the validity of a corporation's transactions.[38]

A consideration of the relevant Companies Act may often be necessary where a company is dealing with registered land. Only in England and Ontario [39] do the registration statutes contain any provision linking up these statutes with the Companies Acts. In Ontario a "companies register" is kept at the registry, and entry therein is made equivalent to registration for the purpose of the registration statute. In England, on the registration of a "charge" by a company, a certificate must be produced shewing either that the charge has been, or does not require to be, registered under the Companies (Consolidation) Act 1908. It has been held in Victoria that the enactment in the Companies Act requiring registration of mortgages does not apply to registered land, and that registration at the land registry under the registration statute can be effected and is sufficient.[40] In some jurisdictions local registration is essential to enable foreign and extra-territorial British companies to hold any

[37] *Rex* v. *Registrar of Titles* (1915) 20 C. L. R. 379; Aust. Torr. Syst. 733, 851, 910; Can. Torr. Syst. 94-96. In *Campbell* v. *Morgan* [1919] 1 W. W. R. 268 (Man.) an assurance to an unlicensed corporation was held valid.

[38] Eng. 1903-8 Rules, r. 256.

[39] Eng. 1903-8 Rules, r. 161; On. 1911 Rules, r. 66. In England s. 14 of the 1900 Act is now replaced by s. 93 of the Companies (Consolidation) Act 1908.

[40] *Coronation Syndicate G. M. Co. to Collins* [1911] V. L. R. 78. Sect. 235 of the Companies Act 1890 is now replaced by s. 101 of the Companies Act 1915 (No. 2631), corresponding with s. 93 of the English Act of 1908; though the language of the repealed and present enactments differs, the case cited seems still applicable. In British Columbia registration at the land registry has been held insufficient: *Dalton* v. *Dominion Trust Co.* [1918] 3 W. W. R. 42 (B. C.); but the Companies Acts themselves (in British Columbia) appear to make registration at the land registry sufficient for purposes of priority: Companies Act Amendment Act 1916 (c. 30), ss. 4, 5, amending s. 102 of Act of 1911 (c. 39), *post*, p. 276.

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interest in land in the jurisdiction, and occasionally registered land is expressly referred to by the companies statute in this connexion.[41] In the absence of any statutory prohibition a foreign company, and à fortiori a company incorporated in some part of the British dominions outside the jurisdiction, would seem to be entitled to be registered as owner or mortgagee and deal with its interest.[42]

A corporation, once registered as owner, may get the benefit of the warranty of title conferred by registration so as to be able to force the title on a purchaser, even though the acquisition of the land by the corporation was ultra vires of its constitution.[43]

The execution of instruments by married women requires special attention in some jurisdictions. In Manitoba and Federated Malay States the statutes are silent on the subject of married women's interests. In Tasmania, Saskatchewan, and Alberta,[44] the statutes only refer to the subject by providing for the registration of a married woman in her married in lieu of her maiden name. In Ontario, New Zealand, North-West Territories, and Trinidad-Tobago,[45] a married woman is placed by the statutes upon the footing of a feme sole, and only in New Zealand and North-West Territories is re-registration in her married name mentioned. On the other hand, in Fiji a formal acknowledgment of an instrument executed by a married woman is required in every case; whilst in Leeward Islands when the instrument is executed abroad acknowledgment is required, but not otherwise.[46] In Jamaica[47] a husband is entitled to be registered in respect of lands of his wife not held for her separate use, but nothing is said as to her execution of instruments. In the remaining jurisdictions—England, Ireland, New South Wales, Queensland, South Australia, Victoria, Western Australia, Papua[48]—the law of married women is substantially

[41] For instance, Alberta: Foreign Companies Ordinance 1903 (c. 14), s. 11, as amended by 1913 (2nd Sess.) c. 2, s. 2; British Columbia: Companies Act Am. Act 1917 (c. 10). And see Aust. Torr. Syst. 733.

[42] *Mutual Assurance Soc.* v. *Registrar-General* (1883) 1 Q. L. J. 177; *Ex p. New Vancouver Coalmining Co.* (1890) 2 B. C. R. 8, 9 B. C. R. 571; *Balfour to Public Trustee* [1916] V. L. R. 397 (English public trustee as corporation sole); *Commonwealth* v. *State of New South Wales* (1918) 25 C. L. R. 325 (Commonwealth as corporation sole).

[43] *Hudson's Bay Ins. Co.* v. *Creelman* [1919] 3 W. W. R. 9 (Privy Council).

[44] Tas. 1862, s. 78; Sas. 1917, s. 202; Al. 1906, s. 83.

[45] On. 1914, s. 103; N. Z. 1915, ss. 129, 172; Can. 1906, ss. 16, 17; Tr. 1902, s. 66. An illustration is *Wells* v. *District Land Registrar* (1901) 21 N. Z. R. 215; see Aust. Torr. Syst. 911.

[46] Fi. 1876 (1906), s. 119; L. Is. 1886 (1914), ss. 151, 152.

[47] J. 1888, s. 104.

[48] Eng. 1875, ss. 44, 45; Br. & Sh. 191. I. 1891, s. 73; 1910 O. 10, r. 3; Bro. & Gl. 181. N. S. W. 1900, ss. 2, 92, 109; Aust. Torr. Syst. 911. Q. 1861, ss. 30, 87, 112; 1877, s. 29. S. A. 1886, ss. 189, 190, 255-257. V. 1915, ss. 3, 124, 267. W. A. 1893, ss. 3, 85, 226. P. 1913, ss. 4, 95, 96.

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the same as in the case of unregistered land, the Married Women's Property Acts being expressly or impliedly made part of the registration statutes, and the question of acknowledgment depending on whether the land is separate property or not.[49]

The dower rights of married women formerly gave some trouble. In many jurisdictions the right to dower has been completely abrogated. In Alberta, on the contrary, dower has by a recent statute been partially revived; so, substantially in Saskatchewan.[50]

The operation of an instrument executed by a person under age is not expressly dealt with in the statutes; it would of course be no greater or less than that of any other imperfectly executed instrument.[51] In Manitoba, Saskatchewan, Alberta, and North-West Territories,[52] the registrar is expressly empowered to require evidence that the person executing an instrument is of full age. In some jurisdictions—for instance, Ontario [53]—the document verifying an execution expressly refers to the executant being of full age.

In the case of illiterate executants the proper course is to follow the practice under which the witness certifies having explained the instrument before execution. In some jurisdictions—for instance, British Columbia [54]—this course is expressly prescribed. Only in Trinidad-Tobago is the registrar authorized by statute to refuse registration when this has not been done.[55]

A further peculiarity of the Trinidad-Tobago statutes is that a mortgage (and some other statutory instruments) cannot be registered unless prepared by a legal practitioner, an exception being made for instruments executed abroad.[56] In England and the Australasian jurisdictions there is the same prohibition against unqualified persons preparing legal instruments relating to registered land as in the case of unregistered land, and in some of the latter a special class of persons, called land brokers, has been created who are authorized to prepare statutory instruments.[57]

[49] Aust. Torr. Syst. 731, 911, 990; *Green* v. *Cooke* (1908) 9 S. R. (N. S. W.) 1. In Saskatchewan some enactments more properly belonging to M. W. P. Acts have been placed in the registration statute itself: Sas. 1917, ss. 200, 201.

[50] Alberta—Dower Act (1917, c. 14); Manitoba—Dower Act (1918, c. 21); Saskatchewan—Homesteads Acts (1915), c. 29; 1916, c. 27). See *ante*, p. 169.

[51] Execution by infants of a particular class of instruments is referred to in a Western Australian statute: W. A. 1909, s. 9.

[52] M. 1913, s. 94; Sas. 1917, s. 209; Al. 1906, s. 145; Can. 1906, s. 195. [53] See form of affidavit under On. 1911 Rules, r. 64.

[54] B. C. 1911, s. 77 (2).

[55] Tr. 1902, s. 122 (1916, s. 2). [56] Tr. 1913, s. 2.

[57] Own. & Inc. 33, 73; Aust. Torr. Syst. 82, 917; *Howell* v. *Owen* (1882) 16 S. A. R. 140.

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In some jurisdictions it is essential that the mortgage be executed in duplicate, in some such execution is merely permitted, and in some provision is made for official copies of the single original which is registered. The jurisdictions in which duplicate execution is required are: New South Wales, Queensland, Tasmania, Papua, New Zealand, Fiji, Federated Malay States, Trinidad-Tobago,[58] though in Trinidad-Tobago it may be dispensed with by consent of the mortgagee. In these jurisdictions, the duplicate execution being peremptorily required by the statutes, each part is in a sense an original. But the part delivered to and retained by the mortgagee is really only a duplicate "of that which forms the effective instrument," i.e., the registered part retained in the registry."[59]

In South Australia, Victoria, Western Australia, Jamaica, Manitoba (in Manitoba by necessary implication),[60] mortgages "may" be executed in duplicate, and in Western Australia sometimes two copies must be lodged at the registry. The above mentioned considerations which, in New South Wales, &c., make the part or copy at the registry the "effective instrument" apply à fortiori when duplicate execution is resorted to. The nature and effect of the transaction is not affected by duplicate execution.[61] These considerations also apply in the same way in Saskatchewan, Alberta, and North-West Territories, where nothing is said about execution in duplicate, though such execution appears to be not uncommon in practice and to be contemplated by some of the enactments relating to the discharge of mortgages.[62] On the other hand, in Manitoba, Saskatchewan, Alberta, and North-West Territories,[63] the necessity for duplicate execution seems to have been designedly avoided by the provision made for issuing to the mortgagee, in the three first-named, a "certificate of charge," and in North-West Territories a "certified copy of the certificate of title," on which of course would be noted the registration of the mortgage.

[58] N. S. W. 1900, s. 36; Q. 1861, s. 35; Tas. 1862, s. 35; P. 1913, s. 24; N. Z. 1915, s. 35; Fi. 1876 (1906), s. 35; F. M. S. 1911, s. 21; Tr. 1902, s. 41.

[59] *Ivey* v. *Commrs. of Taxation* (1903) 3 S. R. (N. S. W.) 184; *Payne* v. *Rex* [1902] A. C. 552, 560; *Rex* v. *Toronto General Trusts Corp.* [1917] 1 W. W. R. 823 (Al.) affd. *Toronto General Trusts Corp.* v. *Rex* (1917) 56 Can. S. C. R. 26, where Aust. Torr. Syst. 761 is cited and approved, and affd. by P. C. [1919] A. C. 679. Aust. Torr. Syst. 761, 905.

[60] S. A. 1886, s. 55; V. 1915, s. 53; W. A. 1893, ss. 53, 105 (1909, s. 13); J. 1888, s. 44; M. 1913, s. 89.

[61] *Great Central Freehold Mines* v. *Chapman* (1904) 29 V. L. R. 910.

[62] Al. 1906, s. 63; Can. 1906, s. 100. *Toronto General Trusts Corp.* v. *Rex*, *supra*.

[63] M. 1913, s. 127; Sas. 1917, s. 101; Al. 1906, s. 71; Can. 1906, s. 97.

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In England, Ireland, Ontario, and Leeward Islands,[64] execution in duplicate is not contemplated at all, but provision is made for what is really (even when not so called) a certified copy of the registered instrument of mortgage. Here there can be no question as to the relative value as evidence of the registered original and certified copy respectively—the copy in the possession of the mortgagee is primâ facie evidence only. In England, Ireland, and Ontario, the certified copy is embodied in a "certificate of charge," which in England can be adapted to the case of incumbrances other than statutory mortgages (r. 181). In England also special provision is made with respect to building society mortgages (rr. 121, 122), and in their case the original instrument (after being registered) may be delivered to and retained by the mortgagees (the society) as a "certificate of charge," whilst the certified copy is filed at the registry.

In England, Ireland, and Ontario,[65] it is enacted that only a registered owner is entitled to deal with land by registered disposition. This seems to be implied in the statutes of other jurisdictions.[66] It is, however, a common practice for a mortgage or other instrument to be executed by a person who intends to be, but is not yet actually, registered as owner. In England, Ontario, New Zealand, and Tasmania,[67] such transactions are expressly referred to in the statutes and made valid. But instruments thus executed operate fully only upon registration, and when such a transaction becomes a registered one there seems to be no room for any question as to the original validity of the execution of the instrument upon which it is based. The validity of such transactions seems to be fully accepted in Canada as well as in Australia,[68] though apparently not in Ireland.[69]

In England, Victoria, and Western Australia,[70] special enactments enable a pending transaction to be completed with the certainty of obtaining priority when actually registered. This is done

[64] Eng. 1875, s. 22; 1903-8 Rules, rr. 121, 122, 181, 259, 259B. I. 1891, ss. 40, 81; 1910 O. 8, r. 2; Bro. & Gl. 153, 258. On. 1914, s. 30; 1911 Rules, r. 48. L. Is. 1886 (1914), s. 49.

[65] Eng. 1875, s. 49; I. 1891, s. 44; On. 1914, s. 68.

[66] See for instance *Re Rivers* (1893) 1 Terr. R. 464—"the only person who could execute a transfer was the registered owner of the land."

[67] Eng. 1897, s. 9 (6); 1903-8 Rules, rr. 96, 104, 105, 157; Own. & Inc. 188, 202. On. 1914, s. 69. N. Z. 1915, s. 69 (1). Tas. 1886, s. 17. Aust. Torr. Syst. 912.

[68] See Can. Torr. Syst. 230; Aust. Torr. Syst. 912.

[69] See Bro. & Gl. 144.

[70] Eng. 1903-8 Rules, r. 117; Own. & Inc. 138, 139, 170. V. 1915, ss. 196-200; W. A. 1893, ss. 148-150; Aust. Torr. Syst. 979.

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in England by entering a priority notice, and in Victoria and Western Australia by obtaining a stay of registration for 48 hours. The same advantage could only be had in other jurisdictions by withholding payment of the mortgage money to the borrower until the mortgage was actually entered on the register.[71]

It is for the mortgagee to register the mortgage, and this should be done as soon as possible after execution. In the event of the actual time of registration being material, the time stated in the registry's endorsement on the instrument will be conclusive, even though this may be merely the time at which the instrument was handed in for registration, and although the entry stating the time may not have been made for some days afterwards.[72] This time of handing in the registrar may be ordered to insert.[73] In many jurisdictions the statutes expressly provide for the date of presentation being the date of registration, and the Victorian case cited brings into line on this point those jurisdictions in which the statutes make no such express provision.

The mortgagee's right to insist on registration can be enforced on his own initiative, and is not merely a right to which the owner of the land is entitled or in which his concurrence is required.[74] The death of the owner of the land between execution and registration of the mortgage would seem not to affect the validity of the registration,[75] even in jurisdictions where no express provision is made by the statutes, though such provision is made in South Australia and Manitoba.[76] Should the mortgagee die before registration, the registration (if effected) would seem to create a valid charge on the land, but the proper course would be for the mortgagee's representative to enter a caveat and subsequently apply for registration of the mortgage at the same moment as he applies for its transmission to himself on the register. In Queensland and Papua [77] the interest of the deceased mortgagee will be transmitted just as though he had already been registered. In the event of the mortgagee's solicitor delaying registration and so permitting a prior entry to be made on the register, the mortgagee may be entitled to recover damages for any loss suffered, such delay being

[71] Own. & Inc. 165, 202; the mortgagee is of course in a stronger position than a purchaser, and can insist on the transaction being completed in any way he chooses. Aust. Torr. Syst. 842, 900.

[72] *Great Central Freehold Mines* v. *Chapman* (1904) 29 V. L. R. 940; *Re Sinclair* (1913) 23 West. R. 286 (Al.).

[73] *In re Bank of Hamilton and McAllister* (1912) 22 West. R. 849 (Al.).

[74] *Perpetual Executors Assoc.* v. *Hosken* (1912) 14 C. L. R. 286.

[75] Aust. Torr. Syst. 790, 791. But as to Ireland, see Bro. & Gl. 144, cited *ante* in note 69. [76] S. A. 1886, s. 59; M. 1913, s. 171.

[77] Q. 1877, s. 49; P. 1913, s. 104.

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primâ facie evidence of actionable negligence on the solicitor's part.[78] It is not however always or necessarily negligence for persons in the position of executors or trustees to leave a mortgage unregistered in the hands of their solicitors.[79]

The general method of registering a mortgage is by entering on the register a note of the existence of the mortgage and filing the instrument itself,[80] as in the case of leases (*post,* Chap. VII, Sect. 2), and not by cancelling the owner's register and registering the mortgagee afresh as may be done in the case of transfers. The certificate of title must be produced for endorsement, and the same considerations apply as to production on registration of a transfer or a lease (*post,* Chap. VII, Sect. 1, sub-sect. 2).

The general result of the registration of the mortgage is to convert into a legal security what was, under the instrument itself unregistered, in effect a mere equitable security. But the operation and detailed method of registration are not the same in all jurisdictions. On one point England and Ireland resemble each other and differ from all other jurisdictions—in requiring the instrument to be under seal (*ante,* p. 222), thus making it operative at once as a deed.

In England express provision is made for omitting from the register itself many entries by which certain covenants and powers are implied or negatived, in cases where statements to the effect of these entries are contained in the registered instrument.[81] This is tantamount to embodying the instrument in and making it part of the register. In Ireland nothing is said in the statutes or rules as to any such constructive embodiment of instruments, though entries are frequently directed to be made in the register, and subsidiary registers are provided for.[82] In Ontario[83] some entries are directed to be made in the register, whilst in some cases this actual entry is dispensed with; it seems however to be intended (s. 80) that mere registration of an instrument shall have the same effect as a corresponding entry actually made in the register. But it is to be presumed that a short note of the existence of the registered instrument is in every case made on the folium constituting the register of the title, and it would thus seem that in all these three jurisdictions a registered instrument must be taken as being

[78] *Alexander* v. *Simpson* (1903) Jamaica, unreported, citing *Hunter* v. *Caldwell* (1847) 10 Q. B. 60, 82.

[79] *Austin* v. *Austin* (1906) 3 C. L. R. 516.

[80] *In re Goldstone's Mortgage* [1916] N. Z. R. 19, 26, referring to Aust. Torr. Syst. 760, 945.

[81] Eng. 1875, ss. 23-28; 1897, s. 9; 1903-8 Rules, rr. 99, 159, 171, 172.

[82] I. 1891, ss. 47, 54; 1910 O. 4, r. 23; Bro. & Gl. 154, 165.

[83] On. 1914, ss. 30 (3), 31-37, 80; 1911 Rules, r. 27.

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embodied in the register for all practical purposes, just as though it were there set out in full.[84] In Ontario, as in the majority of jurisdictions, the registered instrument has the effect of a deed.[85]

In eight jurisdictions—New South Wales, Queensland, South Australia, Tasmania, Papua, New Zealand, Fiji, Trinidad-Tobago [86]—the registered instrument is expressly embodied in and made part of the register, and given the effect of a deed. Here the registration of the mortgage has expressly been held to be—partly through the medium of notice—equivalent to placing on the register every clause in the instrument.[87] So in Manitoba and Federated Malay States,[88] where however the effect of a deed is not given to the registered instrument.

In Victoria and Western Australia the operation of a deed is conferred on the statutory instrument, and though nothing is expressly said by the statutes as to the instrument being embodied in the register, every registered instrument must (as in other Australasian jurisdictions) be noted on the proper folium of the register, and the person named in the instrument then becomes the owner of the interest dealt with.[89] In Manitoba, Jamaica, Leeward Islands, Saskatchewan, Alberta, and North-West Territories,[90] nothing is said as to registered instruments having the efficacy of deeds, but (as in Victoria and Western Australia) the registered instrument must be noted on the register and then operates to vest the interest dealt with. The effect of these enactments in Victoria, Manitoba &c., seems to be to embody the registered instrument in and make it part of the register, just as in New South Wales, &c. The fact that there are in some jurisdictions subsidiary registers

[84] The New Zealand case of *In re Goldstone's Mortgage* [1916] N. Z. R. 19, 439, seems in point.

[85] On. 1914, s. 102; *Beatty* v. *Bailey* (1912) 26 O. L. R. 145. Apparently the effect of a deed is conferred independently of registration.

[86] N. S. W. 1900, s. 36; Q. 1861, ss. 34, 35; S. A. 1886, s. 57; Tas. 1862, s. 35; P. 1913, s. 24; N. Z. 1915, s. 35; Fi. 1876 (1906), s. 35; Tr. 1902, s. 41.

[87] *In re Goldstone's Mortgage*, *supra*, referring to Aust. Torr. Syst. 760, 945. Sect. 10 of the 1913 Act, referred to in this case, is now re-enacted in N. Z. 1915, s. 104.

[88] M. 1913, s. 89; F. M. S. 1911, s. 21.

[89] V. 1915, ss. 51, 58, 124; W. A. 1893, ss. 52, 60, 85. Sects. 124 and 85 of these statutes differ from other enactments, and run: "Every instrument shall be deemed of the same efficacy as if under seal," &c., with which compare On. 1914, s. 102 (*supra*); but registration is essential to the operation of the instrument as an incumbrance. In *Miller* v. *Commr. for Rys.* (1900, 2 W. A. R. 28, 40) the circumstance that the instrument there in question was registered is not specially referred to.

[90] M. 1913, s. 89; J. 1888, ss. 43, 46; L. Is. 1886 (1914), ss. 37, 39-41; Sas. 1917, s. 58; Al. 1906, ss. 41, 60; Can. 1906, ss. 76, 94.

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(as in Ireland, Victoria, Western Australia, Fiji, Saskatchewan),[91] seems not to affect the general principle that registered instruments constitute part of the register.

The enactments in New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Papua, New Zealand, Fiji, and Trinidad-Tobago, make the mortgage instrument, when registered, "to all intents and purposes a deed."[92] But it is not clear how the interest of the mortgagee is affected by his registered mortgage being constructively converted into an instrument under seal. Possibly the advantages of a specialty debt under limitation Acts might be acquired[93] within the jurisdiction, but outside the jurisdiction—beyond the territorial operation of the registration statute—the debt would still be merely one of simple contract.[94] Possibly also the doctrine of estoppel by deed might be invoked if necessary.[95] The registration of the mortgage would give it the effect of a deed so as to operate as a merger of rights under any contract leading up to it.[96] In some instances statutes other than the registration statutes have enacted that a statutory instrument shall be for certain purposes included in the word "deed," but apart from this the unregistered statutory instrument is not (except in England and Ireland, occasionally in Queensland and Papua, and possibly in Ontario, Victoria, and Western Australia) necessarily a deed or equivalent to a deed, even in those jurisdictions —New South Wales, &c.—which give it the effect of a deed on registration.

In Manitoba, Saskatchewan, Alberta, North-West Territories, Jamaica, Leeward Islands, and Federated Malay States, no question can arise as to the instrument of mortgage in the usual statutory form—registered or unregistered—being technically a deed or its equivalent. If the efficacy of an instrument under seal is desired, the statutory instrument must be executed as a deed by the party who is to be bound sealing it in the ordinary way; if it is neither executed under seal nor made for valuable consideration,

[91] I. 1891, s. 54; V. 1915, ss. 52, 141; W. A. 1893, s. 101, and 1909, s. 3; Fi. 1876 (1906), s. 49; Sas. 1917, ss. 28, 29.

[92] *Miller* v. *Commr. for Rys., supra.* This view seems preferable to that taken in *Kelly* v. *Fuller* (1867, 1 S. A. R. 14), where registration was held not to confer the same efficacy with regard to estoppel that an instrument under seal would have had; and see *Sinclair* v. *Gumpertz* (1898, 15 W. N. (N. S. W.) 125), where *Kelly* v. *Fuller* was not approved of.

[93] This is illustrated by *Beatty* v. *Bailey* (1912) 26 O. L. R. 145.

[94] *Payne* v. *Rex* (1901) 26 V. L. R. 705, 752, [1902] A. C. 552, 560; Aust. Torr. Syst. 909, 910.

[95] *Sinclair* v. *Gumpertz, supra; Miller* v. *Commr. for Rys, supra.*

[96] *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575.

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registration (so it has been held) will not give the statutory instrument any greater effect than would be accorded to any other written document which was neither under seal nor valid as a contract.[97] This view is however not inconsistent with the view that registration does make a statutory instrument completely operative as distinguished from a mere inchoate contract, and perhaps the registered instrument does under some circumstances possess an efficacy superior even to an instrument under seal.[98] Thus, the execution of a statutory instrument of mortgage under seal will not make the mortgage a specialty debt out of the jurisdiction so as to govern the *situs* of the debt, but the *situs* will be in the jurisdiction in which the mortgage is registered.[99]

The instrument of mortgage, however, not being technically a deed in the majority of jurisdictions, many rules governing the construction of written instruments will not apply where those rules concern deeds only. Thus, it seems clear that the statutory mortgage, like any other statutory instrument not under seal, may be signed in blank, which would not be permissible were it a deed.[1]

SUB-SECTION 2—RIGHTS AND LIABILITIES OF THE MORTGAGEE.

The statutory mortgage is a charge only, and not a conveyance of the land to the mortgagee. The statutes therefore provide, sometimes expressly and sometimes impliedly, and with varying degrees of precision in the different jurisdictions, that the mortgagee shall have certain rights for the purpose of making his security effective. Incidentally, his liabilities are also the subject of enactment, these liabilities being for the most part correlative with the rights of the owner of the land.

The rights of the mortgagee may be classified under the following heads:

1. Benefit of owner's covenants.
2. Right to distrain.
3. Power to enter and take possession.
4. Power to lease.
5. Power of sale.

[97] *Great Western Lumber Co.* v. *Murrin* [1917] 1 W. W. R. 945 (Al.).

[98] *Toronto General Trusts Corp.* v. *Rex* (1917) 56 Can. S. C. R. 26 (now affd. by P. C. [1919] A. C. 679; and see reporter's note to *Great Western Lumber Co.* v. *Murrin, supra.*

[99] *Toronto General Trusts Corp.* v. *Rex, supra.*

[1] Aust. Torr. Syst. 908; *Bailey* v. *Cribb* (1884) 2 Q. L. J. 62; *Arnot* v. *Peterson* (1912) 21 West. R. 153 (Al.); Can. Torr. Syst. 235; *Dodds* v. *Harper* (1916) 37 O. L. R. 37; *Mahan* v. *Manners* [1918] 2 W. W. R. 191 (Man.); *Mauch* v. *National Securities* [1919] 2 W. W. R. 740 (Al.).

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6. Right to foreclose.
7. Right to deal with the mortgage security.
8. Miscellaneous rights.
9. General rights as under the ordinary law of unregistered land.

1. *Benefit of owner's covenants.* In all twenty jurisdictions, except Leeward Islands, distinct covenants for payment of principal and interest constitute a part of every statutory mortgage, either by being expressly inserted in the prescribed forms of mortgage, or by being impliedly contained therein in virtue of express enactment. The Leeward Islands form, indeed, though containing no separate covenant for payment, can hardly be interpreted otherwise than as implying an agreement to pay the principal — "advanced to me by way of loan"—and interest, on which an action would lie, apart from the effect of registration. The same may perhaps be said of the prescribed forms in England and Ontario, which would seem necessarily to imply an agreement for repayment apart from registration, though in these two jurisdictions the statutes themselves enact that on registration covenants for payment are implied.[1] In the other seventeen jurisdictions covenants for payment are inserted in the prescribed forms, and in addition are by express enactment implied in six of them—Queensland, Victoria, Western Australia, Papua, New Zealand, Jamaica.[2] In the case of Federated Malay States the word "covenant" is not used, but the word "agreement" takes its place in the prescribed form. It would seem that these covenants for payment would operate as agreements independently of registration, though in the six jurisdictions first mentioned—Queensland, &c.—as well as in England and Ontario, the covenant implied by express enactment would only arise on registration.[3] The result is that the mortgagee gets, one way or another, covenants for payment of principal and interest in all twenty jurisdictions—unless of course an agreement to the contrary is made.

There is, however, a distinction between covenants that are (on registration) implied by express enactment in the statute, and covenants that are set out in the instrument of mortgage. In the eight jurisdictions—England, Ontario, Queensland, Victoria, Western Australia, Papua, New Zealand, Jamaica—in which the statutes

[1] Eng. 1875, s. 73; On. 1914. s. 31.

[2] Q. 1861. s. 69; V. 1915, s. 153; W. A. 1893, s. 113; P. 1913, s. 75; N. Z. 1915. s. 103, sch. 4; J. 1888, s. 86.

[3] Aust. Torr. Syst. 908; *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575; *ante*, *p.* 221.

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themselves imply the covenants, "the obligation to pay rests"—at all events when the instrument of mortgage itself contains no relevant covenant—"upon the covenant or contract imposed by statute, and is therefore an action founded upon a specialty within the meaning of the statute of limitations."[4] Where there is an express covenant set out in the mortgage, it may be that this covenant is to be regarded as replacing the implied covenant, and so as not being a covenant "imposed by statute"; in that case the implied covenant would in effect be entirely negatived. There is judicial opinion both for and against this view of the effect of an express covenant on the covenant implied by statute.[5]

In some jurisdictions a covenant for further assurance is implied in every statutory instrument. These are: New South Wales, Queensland, South Australia, Tasmania, Papua, New Zealand, Fiji, Federated Malay States (where it is called "agreement"), Trinidad-Tobago, Saskatchewan, Alberta, North-West Territories.[6] Apparently, the covenant would only be implied on registration of the instrument, but its object would usually be effected when the instrument became operative by registration, and the effect of the implied covenant is not clear.[7] The only other jurisdictions that need be mentioned in this connexion are England and Ireland.[8] where the Conveyancing Acts are for some purposes incorporated into the registration statutes, and covenants for title, &c., may occasionally be implied if necessary.

A covenant to insure against fire is implied against the owner by express enactment in New Zealand,[9] and is inserted in the prescribed form of mortgage in New South Wales, Victoria, Western Australia, and Jamaica.

A covenant to repair is implied in fourteen jurisdictions: the nine Australasian, Federated Malay States, Jamaica, Saskatchewan, Alberta, North-West Territories.[10] In Victoria it has been said

[4] *Beatty* v. *Bailey* (1912) 26 O. L. R. 145, 151. And see *Fink* v. *Robertson* (1907) 4 C. L. R. 864, 882, though in that case the mortgage instrument itself contained express covenants.

[5] For: *Australian Deposit Bank* v. *Lord* (1876) 2 V. L. R. L. 31, 34. Against: *Fink* v. *Robertson*, *supra*.

[6] N. S. W. 1900, s. 75; Q. 1861, s. 67; S. A. 1886, s. 261; Tas. 1862, s. 36; P. 1913, s. 73; N. Z. 1915, s. 104; Fi. 1876 (1900), s. 36; F. M. S. 1911, s. 22; Tr. 1902, s. 42; Sas. 1917, s. 64 (1); Al. 1906, s. 40; Can. 1906, s. 68.

[7] *West* v. *Read* seems to be the only relevant case; there the instrument was a transfer.

[8] Eng. 1897, ss. 9, 16; 1903-8 Rules, r. 99; Own. & Inc. 176, 193. I. 1891, s. 140.

[9] N. Z. 1915, s. 103, sch. 4.

[10] N. S. W. 1900, s. 77; Q. 1861, s. 69; S. A. 1886, s. 130; Tas., 1862, s. 62; V. 1915, s. 153; W. A. 1893, s. 113; P. 1913, s. 75; N. Z. 1915, s. 103, sch. 4; Fi. 1876 (1906), s. 75; F. M. S. 1911, s. 57 ("agreement"); J. 1888, s. 86; Sas. 1917, s. 104; Al. 1906, s. 69; Can. 1906, s. 108.

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that this covenant in effect runs with the land, owing to the wording of the enactment,[11] and if so, the same construction must be placed on the enactments in Western Australia and Jamaica.

In many jurisdictions a covenant by the owner to insure may be introduced (when not already there) into the prescribed form by employing a short form of words as directed by the statute, viz.: Ontario, New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Papua, Trinidad-Tobago, Jamaica.[12] In Saskatchewan, Alberta, and North-West Territories covenants for title may be introduced in a similar way, but these do not seem to be of any practical use.[13] In Ontario certain covenants other than for insurance may also be introduced under the enactment already cited.

Covenants by the owner in a mortgage of leasehold land are by express enactment implied in England and Ontario, viz. to pay the rent and observe the covenants reserved and contained in the lease, and indemnify the mortgagee against breach.[14] In Ireland and Trinidad-Tobago [15] such covenants are implied by the incorporation of portions of the general law. In other jurisdictions these covenants would, if required, have to be specially introduced into the mortgage instrument.

The most important of the covenants are the covenants for payment. These constitute in reality a security collateral and in addition to the security over the land, whilst other covenants—to insure, repair, &c.—merely enable the mortgagee to take advantage of their breach by realizing his security over the land, being themselves an actual part of that security. Hence the covenants for payment to some extent operate independently of the creation and extinguishment of the security over the land. As already pointed out (*ante*, p. 220), the completion of the security by registration is probably not a condition precedent to an action being brought for the recovery of the principal and interest. Other questions arise as to how the mortgagee's right of action is affected by the formal discharge of the mortgage, the sale and transfer of the land under the power of sale, and the extinguishment of the owner's

[11] *In re Burton* (1901) 27 V. L. R. 427, 442.

[12] On. 1914, s. 31 (2), cl. 12 in Short Forms Act; N. S. W. 1900, s. 81; Q. 1861, s. 73; S. A. 1886, s. 265, sch. 16; Tas. 1862, s. 65; V. 1915, s. 155, sch. 14; W. A. 1893, s. 115, sch. 16; P. 1913, s. 80; Tr. 1902, s. 79; J. 1888, s. 88, sch. 10. And see Aust. Torr. Syst. 944.

[13] Sas. 1917, s. 105, sch. T; Al. 1906, s. 70, sch. S; Can. 1906, s. 109, sch. U. And see Can. Torr. Syst. 237.

[14] Eng. 1875, s. 24; On. 1914, s. 32.

[15] I. 1891, ss. 40, 53; Tr. 1902, s. 75.

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rights of property in the land by the land being vested in the mortgagee through foreclosure or some equivalent proceeding.

With respect to the effect of a formal discharge, the better opinion would seem to be that, if the intention to reserve the benefit of the covenants contained in the mortgage instrument be clearly shewn, the extinguishment of the mortgage on the register as a charge upon the land will not necessarily extinguish the personal covenants; the result is that the mortgagee can recover the debt from the owner, notwithstanding that the mortgage has been removed from the register and no longer affects the land.[16] In practice the prudent course is to state clearly in the instrument of discharge that it is intended to release the land only and not the personal obligation.[17]

The transfer to a purchaser in exercise of the mortgagee's power of sale appears to extinguish the mortgage as a charge on the land, just as a formal discharge of the mortgage does. But in this case also the mortgagee appears to be at liberty to recover any part of the debt remaining unpaid, on the footing of the personal obligation continuing in existence.[18] In practice it is advisable to have the right of the mortgagee clearly stated so as to appear on the register; in some registries arrangements are made for having this done.[19]

The right to sue on the covenant for payment may sometimes be put an end to by foreclosure operating to extinguish the debt. The effect of the covenants, as authorizing a demand for payment and subsequent exercise of the power of sale, is not however lessened by the recovery of judgment for the mortgage debt.[20]

In Australia the debt is extinguished by foreclosure (in Victoria under statute)[21]; in most Canadian jurisdictions the debt is not necessarily extinguished.[22] In Australia the mortgagee after

[16] Aust. Torr. Syst. 967; Own. & Inc. 194; *Bell* v. *Rowe* (1901) 26 V. L. R. 511, 521; *Beatty* v. *Bailey* (1912) 26 O. L. R. 145. And see further under "Discharge of Mortgage," *post*, p. 270.

[17] See *Beatty* v. *Bailey*, *supra*, where this was done.

[18] Aust. Torr. Syst. 961; Own. & Inc. 194; *Trust and Agency Co.* v. *Markwell* (1874) 4 Q. S. C. R. 50; *Bell* v. *Rowe*, *supra*; *In re Richardson* (1871) L. R. 12 Eq. 398, 13 Eq. 142; *Beatty* v. *Bailey*, *supra*. And see further under "Power of Sale," *post*, p. 249.

[19] See Br. & Sh. addenda to pp. 171, 595.

[20] *National Mortgage and Agency Co.* v. *Maslin* (1915) 34 N. Z. R. 251.

[21] Conv. Act 1915, s. 32 (see V. 1915, s. 162, in Appendix *post*), *Fink* v. *Robertson* (1907) 4 C. L. R. 864, 885; *Knox* v. *Phillips* (1918) 19 S. R. (N. S. W.) 7. And see as to British Columbia, sect. 3 *post* p. 277; B. C. 1911, s. 14A.

[22] *Mutual Life Ass. Co.* v. *Douglas* (1918) 57 Can. S. C. R. 243, where *Fink* v. *Robertson* was not followed. *Colonial Invest. Co.* v. *King* (1902, 5 Terr. R. 371) is overruled on this point. See "Foreclosure," *post*, p. 260.

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foreclosure cannot prove as a secured creditor in liquidation proceedings;[23] in Canada he can enforce a collateral security, as by retaining insurance moneys, since the debt on which his right to do so depends, is still in existence.[24]

The mortgagee's right of action on the covenant would seem to be barred at the end of the period limited by limitation Acts, notwithstanding that his right to possession of the land may in some jurisdictions be unaffected by any lapse of time (*ante*, p. 85). Only in Manitoba is it enacted that the right of action under the covenant for payment is not kept alive beyond the ordinary statutory period by the provisions of the limitation Acts being abrogated with respect to the land itself.[25] In New Zealand it appears to have been assumed rather than decided that the right of action on the debt is barred notwithstanding that the mortgagee's rights with respect to the land itself and its possession are not barred by lapse of time.[26] On this view the rule as enacted in Manitoba will apply in all jurisdictions, and the mortgagee's right of action on his covenant will be exercisable only subject to the provisions of relevant limitation Acts.

In some jurisdictions the mortgagee gets the benefit of an implied covenant directly from the transferee, when the land is transferred subject to the mortgage; in others the covenants implied on the part of the mortgagor are so framed as to make it possible to construe them as binding the transferee directly. In all twenty jurisdictions except England, Ireland, and Ontario, a covenant is by express enactment implied in the instrument transferring mortgaged land that the transferee will pay the moneys secured and indemnify the former owner (the original mortgagor); this statutory obligation imposed on the transferee is the same in principle as the obligation "which would be enforced in equity against the grantee of an equity of redemption" under ordinary law.[27] In England such a covenant of indemnity may be inserted in the transfer and noted on the register,[28] and this covenant would probably be implied in any case in England, and also in Ireland and Ontario. It is the actual transferee on whom the covenant for indemnity is imposed, not the purchaser, when the latter directs land to

[23] *In re Premier Perm. Build. Assoc.* (1899) 25 V. L. R. 77, as overruled by *Fink* v. *Robertson*, *supra*.

[24] *Mutual Life Ass. Co.* v. *Douglas*, *supra*. But see now Al. 1906, s. 62B.

[25] M. 1913, s. 117. This section is also enacted as s. 24 (3) of the Real Property Limitation Act (R. S. 1913, c. 116).

[26] *Campbell* v. *Auckland Dist. Registrar* (1910) 28 N. Z. R. at p. 820, 29 N. Z. R. 332, 338; *Shirley* v. *Tapper* (1904) 13 N. Z. R. 849.

[27] *Ex p. Finlay* (1884) 10 V. L. R. 68, 83.

[28] Eng. 1903-8 Rules, r. 133; Own. & Inc. 177, 319.

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be transferred to a nominee.[29] And the transferee is not liable to indemnify the transferor if the latter is not the actual vendor.[30]

In South Australia and Alberta[31] the covenant is implied on the part of the transferee with the transferor and also (in South Australia so long as the transferee remains the owner) with the mortgagee directly. In these jurisdictions the transferee will, in a properly framed action, be personally and directly liable to the mortgagee, and even after transferring the land to another.[32] But this liability only arises under the same circumstances that would give rise to the transferor's right of indemnity; the transferee has therefore been held not to be liable to the mortgagee where the transfer was merely by way of security, or where only an undivided interest in the land was transferred.[33] And it has been held that the transferee will not be liable to the mortgagee if he has not executed the instrument of transfer, and that to make him so liable the transfer must either be under seal or must shew some consideration moving from the transferee.[34]

In Victoria, Western Australia, and Jamaica,[35] the covenant implied on the part of the transferee is with the transferor only, but other enactments purport to place transferees upon the some footing as to obligations as their transferors. The weight of authority is in favour of the covenant being one for indemnity only, not rendering the transferee of the land personally and directly liable to the mortgagee for the mortgage debt, but the question has been expressly left open in Australia.[36] In New Zealand, Manitoba, and Saskatchewan,[37] also the covenant is with the transferor, and the wide interpretation clause in the New Zealand statute does not seem to make the covenant for payment run with the land or render the transferee liable directly to the mortgagee. In the remaining nine

[29] *Chant* v. *Rhodes* [1917] N. Z. R. 184.

[30] *Peterson* v. *Wickson* [1918] 2 W. W. R. 289 (Man.).

[31] S. A. 1886, s. 97; Al. 1906, s. 52; Can. Torr. Syst. 236.

[32] *Colonial Invest. Co.* v. *Foisie* (1911) 19 West. R. 748 (Sas.); *Trusts & Guarantee Co.* v *Stephens* [1919] 3 W. W. R. 410.

[33] *Short* v. *Graham* (1908) 7 West. R. 787 (Al.): *Montreal Trust Co.* v. *Boggs* (1915) 31 West. R. 914 (Sas.); *Dominion of Canada Invest. Co.* v. *Carstens* [1917] 3 W. W. R. 153 (Sas.).

[34] *Great Western Lumber Co.* v. *Murrin* [1917] 1 W. W. R. 945 (Al.). There is an interesting reporter's note to this case, questioning the soundness of the views expressed in it, and suggesting that the effect of registration has been unjustifiably minimized. It must be remembered that in South Australia (though not in Alberta) the statutory instrument becomes on registration equivalent to a deed: S. A. 1886, s. 57, *ante*, p. 234.

[35] V. 1915, ss. 127, 153, 269; W. A. 1893, ss. 88, 113, 228; J. 1888, ss. 67, 86, 106.

[36] *Fink* v. *Robertson* (1907) 4 C. L. R. 864, 882. See Aust. Torr. Syst. 920.

[37] N. Z. 1915, ss. 88, 103, 222, sch. 4; Man. 1913, s. 97; Sas. 1917, s. 64 (2).

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jurisdictions—New South Wales, Queensland, Tasmania, Papua, Fiji, Federated Malay States, Trinidad-Tobago, Leeward Islands, North-West Territories [38]—no covenantee is mentioned, and the implied covenant is an ordinary one of indemnity, not saddling the covenantor with any personal obligation to the mortgagee.[39]

Where the statutes do not impose on the transferee a direct liability to the mortgagee, the latter may take an assignment from the owner-transferor of the benefit of his covenant of indemnity with the transferee, and an action may then be brought directly by the mortgagee against the transferee.[40]

The usual effect of the statutory implied covenant for indemnity is that when the land is transferred to the mortgagee the mortgage is extinguished, the interest under the mortgage being merged in the ownership of the land.[41] But this result will not follow if it plainly appear that the intention of the parties was to keep the mortgage on foot as a charge on the land,[42] and for this purpose the transfer is often made in favour of a nominee of the mortgagee instead of to the mortgagee himself.[43] In Queensland and Papua [44] it is specially enacted that the mortgagee is "entitled" to have the mortgage removed from the register, and of course this is a right that as owner of the land he could waive.[45]

2. *Right to distrain.* In many jurisdictions one of the statutory rights of a mortgagee is a right to enter and distrain on the goods of the occupier, independently of the right to enter into possession. No such express right is conferred in England, Ireland, Ontario, Trinidad-Tobago, Leeward Islands, Saskatchewan, Alberta, or North-West Territories. In these jurisdictions any power of distress would either arise by implication under the right to enter into possession as mortgagee, or would have to be conferred by means

[38] N. S. W. 1900, s. 76; Q. 1861, s. 68; Tas. 1862, s. 46; P. 1913, s. 74; Fi. 1876 (1906), s. 45; F. M. S. 1911, s. 32; Tr. 1902, s. 59; L. Is. 1886 (1914), s. 24; Can. 1906, s. 69.

[39] Aust. Torr. Syst. 920; Can. Torr. Syst. 236.

[40] *Morice* v. *Kerningham* (1908) 9 West. R. 307 (Man.); Can. Torr. Syst. 238.

[41] *In re Victorian Farmers' Co.* (1897) 22 V. L. R. 629; *Fink* v. *Robertson* (1907) 4 C. L. R. 864, 877; *Re Riddell* (1907) 7 West. R. 301 (Sas.); *Reeves* v. *Konschur* (1909) 10 West. R. 680.

[42] *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631, 652; *Reeves* v. *Konschur, supra; In re Major* (1897) 5 B. C. R. 244.

[43] Illustrations are: *In re Victorian Farmers' Co., supra; Daly* v. *Union Trustee Co.* (1898) 24 V. L. R. 460.

[44] Q. 1877, s. 19; P. 1913, s. 39.

[45] See *Reeves* v. *Konschur* (1909) 10 West. R. 680, 692, quoting Aust. Torr. Syst. 829—"a plaintiff is entitled . . conclusive against the defendant."

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of special clauses in the mortgage instrument,[46] and under any such special clause a mortgagee can only distrain as landlord, being bound by landlord and tenant law: he cannot therefore get judgment pending sale of the distress.[47]

In New South Wales, Fiji, and Federated Malay States,[48] the right given is to distrain "for the rent then due," the owner's powers as landlord being ipso facto vested in the mortgagee upon the latter giving notice to the occupier. This power of distress for "rent" seems clearly to arise only where there are tenants of the owner in occupation, and not to authorize the mortgagee to distrain when the owner himself is in actual occupation. The power is not one to distrain for arrears of rent as such. The New South Wales enactment (s. 60) makes the power of distress exercisable by the mortgagee as if the mortgage had been effected "by a conveyance of the legal estate."[49] This does not appear to differentiate the enactment from those of Fiji and Federated Malay States for any practical purpose, and in all those jurisdictions the intention seems to be to place the mortgagee in the same position with regard to the tenants of the owner as he would be under the general law and in the case of unregistered land.[50]

In Queensland, South Australia, Tasmania, Papua, and New Zealand,[51] the right given is to distrain for arrears of principal or interest to an amount not exceeding any rent then due from the occupier to the owner. This power is one to distrain for "interest" as such, and not merely for rent. It has been held in South Australia and New Zealand [52] that "occupier" here does not include the owner himself when in occupation of the land, so that the mortgagee cannot distrain under the statutory power when the owner himself is in actual occupation. This would be to place the same construction upon these enactments as upon those of New South Wales, &c. Seeing that the power is one to distrain for "interest," differing in this respect from the power in New South Wales, &c., it seems per-

[46] Can. Torr. Syst. 296, 297, 302-304. And see *ante*, p. 214.

[47] *Fawell* v. *Andrew* [1917] 2 W. W. R. 400 (Sas.).

[48] N. S. W. 1900, ss. 60, 63; Fi. 1876 (1906), ss. 60, 61; F. M. S. 1911, ss. 44, 45.

[49] The effect of this clause was considered in *Finn* v. *London Bank of Australia* (1898) 19 N. S. W. 364.

[50] An à fortiori illustration is afforded by a case in Saskatchewan, where no statutory power of distress is given to mortgagees: *Vousden* v. *Hopper* (1911) 16 West. R. 294, 298.

[51] Q. 1861, ss. 60, 61; S. A. 1886, ss. 137, 138; Tas. 1862, ss. 56, 57; P. 1913, ss. 52, 53; N. Z. 1915, s. 106.

[52] *Hart* v. *Stratton* (1873) 7 S. A. R. 84; *In re Ross and McNeil* (1886) 5 N. Z. S. C. 322.

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missible to make "occupiers" in these enactments include the owner when in occupation, notwithstanding the reference to "rent" in one part of the enactments.[53] The right to distrain on the owner's chattels may be ousted when these chattels are the subject of an independent security in favour of another mortgagee.[54] The statutory power is not restricted to first mortgagees, but a second or third mortgagee could only exercise it with the assent, express or implied, of earlier incumbrancers.

In the remaining four jurisdictions—Victoria, Manitoba, Western Australia, Jamaica[55]—the right given is to distrain for arrears of interest to an amount not exceeding rent due, and the "occupier" whose goods may be distrained has been held to include the owner himself when in occupation.[56] In Manitoba the right of the mortgagee to distrain for arrears of interest is, by general legislation, restricted to the goods of the owner himself.[57] In all four jurisdictions a distinction is made between first and other mortgagees. In Victoria and Manitoba the statutory power is conferred on "first" mortgagees only, and in Western Australia and Jamaica it is to be exercised "according to their priorities" if there be more than one mortgage. These enactments also resemble that of New South Wales in purporting to give the mortgagee the rights of a landlord against the tenant, and to place him in the same position as that occupied by a mortgagee under a mortgage by conveyance. But this statutory power of distraining for "interest"—as distinguished from "rent"—would not of itself, any more than a similar express power inserted in a mortgage whether of registered or unregistered land,[58] create the relationship of landlord and tenant; hence the goods of strangers could not be seized, nor could the occupier claim in other respects the rights of a tenant

[53] This is the interpretation placed upon the Victorian enactments: *McLeish* v. *Forrest* (1895) 21 V. L. R. 384. In New Zealand the enactments now repealed certainly indicated an intention to exclude the owner from "occupiers": Aust. Torr. Syst. 957.

[54] *Queensland Mortgage Co.* v. *British and Australasian Trust Co.* (1887) 3 Q. L. J. 4.

[55] V. 1915, ss. 151, 152, 156; M. 1913, ss. 114-116; W. A. 1893, ss. 111, 112, 116; J. 1888, ss. 84, 85, 89.

[56] *McLeish* v. *Forrest*, *supra*.

[57] Distress Act (R. S. 1913, c. 55), s. 2. See *Linstead* v. *Hamilton Provident Soc.* (1896) 11 Man. R. 199; *Miller* v. *Imperial Loan Co.*, *ib.* 247. There is similar general legislation in Ontario, Saskatchewan, Alberta, and North-West Territories: see *Trust and Loan Co.* v. *Lawrason* (1882) 10 Can. S. C. R. 679; *Edmonds* v. *Hamilton Provident Soc.* (1890) 18 O. A. R. 347; *Vousden* v. *Hopper* (1911) 16 West. R. 294 (Sas.); Can. Torr. Syst. 303.

[58] See *Vousden* v. *Hopper*, *supra*, at p. 298; *Doe* v. *Goodier* (1847) 10 Q. B. 957.

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against the mortgagee, if this statutory power only had to be relied on.

The power of distress may also be conferred by the relationship of landlord and tenant being, expressly or by the statutes, created between the parties. This is referred to *ante,* p. 214, and also *post* under the head of "general rights."

3. *Power to enter and take possession.* In all twenty jurisdictions the statutes make some provision, expressly or by implication, enabling the mortgagee to obtain possession of the land, notwithstanding that his security is by way of charge and not conveyance. In Ireland, Trinidad-Tobago, and North-West Territories,[59] this provision is by implication only, the general law being incorporated into the registration statutes of Ireland and Trinidad-Tobago, while in North-West Territories the aid of the court must be sought in every case.[60]

In England and Ontario [61] the mortgagee is given the right to enter on the land at any time, "or into receipt of the rents and profits," subject to any express agreement, to any prior incumbrances, "and to the liability attached to a mortgagee in possession." Nothing is said about any analogy between the position of the mortgagee so taking possession and that of a mortgagee by conveyance under the general law. In England the Conveyancing Acts are to some extent incorporated in the registration statutes.[62] The principal difficulty in both England and Ontario statutes relates to the position of the mortgagee with respect to the tenants of the owner. The mortgagee appears to have a right to bring an action for recovery of the land,[63] and in some cases it may be advisable as a practical precaution to take an assignment from the owner of the benefit of the lessee's covenants, when the mortgaged land is in the possession of a lessee.[64] The whole question of the rights and liabilities of lessees in relation to the owner and mortgagee of the reversion is complicated by the scheme of the English and Ontario statutes, under which leases are not susceptible of direct registra-

[59] I. 1891, s. 40; Tr. 1902, ss. 75, 132; Can. 1906, ss. 99, 142. Sect. 132 of Tr. 1902 is only cited to call attention to the marked omission of all mention of mortgagees, as contrasted with such an enactment as N. S. W. 1900, s. 124, on which it is modelled.

[60] Can. Torr. Syst. 295 *et seq.*, though the Alberta statutes are now amended and express powers conferred on the mortgagees.

[61] Eng. 1875, s. 25; On. 1914, s. 33; Own. & Inc. 195-198.

[62] Eng. 1897, ss. 9, 16.

[63] *Vousden* v. *Hopper* (1911) 16 West. R. 294, 298 (Sas.); Own. & Inc. 196.

[64] Own. & Inc. 196, 232-237.

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tion.[65] Since leases either require no protection on the register, or are only protected by a registered "notice," they are largely to be regarded as unregistered dispositions, and must be treated accordingly in conveyancing transactions.

In Fiji and Federated Malay States the mortgagee may only enter into possession of the land "by receiving the rents and profits thereof," and in Leeward Islands the enactments are to the same effect.[66] Apparently, in order to recover possession of the land itself, the mortgagee would have to exercise the power of sale.

In Saskatchewan and Alberta[67] there is express power for the mortgagee "to enter into possession of the lands and receive" the rents and profits (in Saskatchewan only if the mortgage contains a covenant authorizing this), whilst reference is made to an action to recover the land itself "as against a mortgagor in default"; it would seem that occupiers claiming under interests created subsequently to the mortgage could be ejected as well as the mortgagor himself.[68] In Manitoba the power is to enter into possession "by receiving the rents and profits," and also to bring an action to recover the "land" as though the mortgage had been made "by assurance of the legal estate," with a right in the owner of quiet enjoyment until default.[69] In Saskatchewan the relationship of landlord and tenant may be created between mortgagee and mortgagor "for all purposes and as against all persons."[70]

The provisions in the remaining nine jurisdictions—the Australasian (except Fiji) together with Jamaica[71]—resemble those of Manitoba, but these nine differ from others in making special provision for mortgages of leaseholds. The powers are to enter into possession "by receiving the rents and profits" (in South Australia "and receive," &c.) and to bring an action for recovery of the land. In Tasmania a special procedure for obtaining possession, in lieu of the ordinary action, is laid down (ss. 116-118). In Victoria, Western Australia, and New Zealand, the remedies of

[65] Eng. 1875, ss. 50, 51; 1903-8 Rules, rr. 201-206; Own. & Inc. 125-128. 234. On. 1914. s. 70.

[66] Fi. 1876 (1906), s. 60; F. M. S. 1911. s. 44; L. Is. 1886 (1914), ss. 72-74, 83.

[67] Sas. 1917, ss. 108 (1), 159; Al. 1906, ss. 62A (1), 104.

[68] *Vousden* v. *Hopper*, *supra*.

[69] M. 1913, ss. 84, 114, 116, 118. Sects. 114 and 118 are not quite consistent with each other.

[70] Sas. 1917, s. 116.

[71] N. S. W. 1900, ss. 60, 63, 64, 124; Q. 1861, ss. 60, 62, 123; S. A. 1886, ss. 137, 139, 192; Tas. 1862, ss. 56, 58, 116-118, 124; V. 1915, ss. 151, 154, 156, 244; W. A. 1893, ss. 111, 114, 116, 199; P. 1913, ss. 52, 54. 144; N. Z. 1915, ss. 59, 105, 118-120; J. 1888, ss. 84, 87, 89, 135. And see Aust. Torr. Syst. 953-956.

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landlords against tenants for recovery of possession are expressly conferred on mortgagees in addition to the ordinary remedy by action. In New South Wales the powers of entry and of recovery by action are to be exercised as though the mortgage had been made by "conveyance of the legal estate," and in Victoria, Western Australia, and Jamaica, the right of action is to be exercised as though the mortgage had been made by "assurance of the legal estate." The mortgagee of a leasehold taking possession in these nine jurisdictions is liable to the lessor under the covenants and conditions of the lease—to the extent of the rents and profits received; this latter limitation does not occur in the Queensland and Papua enactments, and has been held not to apply where the land is unoccupied and the mortgagee takes actual possession.[72] In Tasmania (s. 117) and New Zealand (s. 119) the right of a mortgagee of a lease is expressly saved, when the lessor or his mortgagee is taking proceedings for possession, on payment of arrears of rent with costs and damages. This enactment only applies when the lessor can be reinstated to the position in which he was before breach of covenant, but the mortgagee of the lease may be entitled to relief although the lessee himself may not be so entitled;[73] general legislation to some extent covers the same ground in other jurisdictions.

Where, as in these nine jurisdictions—New South Wales, &c.—and Manitoba, express power is given for a mortgagee to recover possession of the land by action, the right of action is not only against the owner himself as mortgagor in default, but has been said to extend to all persons in possession.[74] This must probably be taken with a qualification as to the rights of tenants and occupiers who hold under rights created prior to the mortgage.[75] When the tenancies have been created after the mortgage, the mortgagee may recognize and adopt them, and he will then be bound by them;[76] he may make the tenants his own tenants by mere notice, though this could not always be done in the case of unregistered land.[77]

[72] N. S. W. 1900, s. 64; Q. 1861, s. 62; S. A. 1886, s. 139; Tas. 1862, ss. 58, 117; V. 1915, ss. 154, 156; W. A. 1893, ss. 114, 116; P. 1913, s. 54; N. Z. 1915, ss. 119, 120; J. 1888, ss. 87, 89. *National Mortgage Co.* v. *Kaiapoi (Mayor)* (1889) 7 N. Z. R. 231; *Seabrook* v. *McMullan* (1908) 10 W. A. R. 47; Aust. Torr. Syst. 955.

[73] *Rakera* v. *Downs* [1916] N. Z. R. 669.

[74] *Ockers* v. *Merry* (1872) 2 Q. S. C. R. 193.

[75] See *Vousden* v. *Hopper* (1911) 16 West. R. 294, 298 (Sas.); Aust. Torr. Syst. 955.

[76] *Thomson* v. *Finlay* (1886) 5 N. Z. S. C. 293.

[77] *Bank of New South Wales* v. *Palmer* (1881) 2 N. S. W. 125 (the enactments there referred to are now N. S. W. 1900, ss. 60, 63, and these sections are to be read together); *Equity Trustees Co.* v. *Ayrey* (1900) 26 V. L. R. 625.

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4. *Power to lease.* Only in four jurisdictions do the statutes expressly confer leasing powers on a mortgagee — South Australia, Manitoba, Saskatchewan, Alberta.[78] In Ireland[79] the Conveyancing Acts are incorporated by reference, and the powers of leasing in those Acts therefore apply to mortgages of registered land. In England also the leasing powers of the Conveyancing Acts probably apply to mortgages of registered land.[80] In other jurisdictions the power must either be expressly conferred in the instrument (as to which see *ante,* p. 219), or reliance must be placed on the implied authority which, by analogy to the general law concerning unregistered land, a mortgagee in possession has to make leases of the mortgaged land. In Leeward Islands, apparently, it is not intended that a mortgagee shall have power to lease.[81]

In South Australia the mortgagee may, on default in payment of principal or interest, lease from time to time for not exceeding a year. In Manitoba, Saskatchewan, and Alberta, the power is, to "make any lease . . . as he may see fit," but the power can only be exercised after the statutory notice has been given and filed or registered, and this notice can only be given after default has continued for at least one calendar month.

Only in New South Wales does the statute in so many words give the mortgagee the right to enter into possession as though the mortgage had been made by conveyance instead of charge; the effect of this is to confer leasing powers on the mortgagee.[82] In Victoria wide general powers are conferred on a "first" mortgagee, and in Western Australia and Jamaica on "every" mortgagee, as though they held under mortgages by conveyance,[83] and a power of leasing might perhaps be included in these powers. The effect of this wide general power is considered later on.

5. *Power of sale.* The North-West Territories is the only one of the twenty jurisdictions in which no provision is made for a sale by the mortgagee otherwise than by means of an application to the court.[84] In the other nineteen powers of sale are expressly or impliedly conferred on mortgagees, though in some cases the sale has to be carried out by the court or under the direction of the registrar.

[78] S. A. 1886, s. 137; M. 1913, s. 118; Sas. 1917, s. 108; Al. 1906, s. 62A (1).

[79] I. 1891, s. 40.

[80] Own. & Inc. 235.

[81] L. Is. 1886 (1914), s. 87.

[82] N. S. W. 1900, s. 60; *Finn* v. *London Bank of Australia* (1898) 19 N. S. W. 364 (s. 60 being a re-enactment of s. 58 there referred to).

[83] V. 1915, s. 156; W. A. 1893, s. 116; J. 1888, s. 89.

[84] Can. 1906, s. 99.

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In Ireland and Trinidad-Tobago [85] express power of sale is not conferred, but the powers of mortgagees are those which mortgagees of unregistered land have under the general law. In other jurisdictions powers of sale are expressly given, though the methods of conferring them are not uniform.

In England and Ontario [86] the registration statutes enact that a power of sale may be inserted in the instrument of mortgage, and is then to be entered on the register when the mortgage is registered; if the instrument of mortgage contains no power of sale, sale can be "enforced" by the ordinary proceedings in court as though "the land had been transferred to him by way of mortgage subject to a proviso for redemption"; if a power of sale has been inserted in the mortgage, the mortgagee can "sell and transfer" the land as though "he were the registered" owner of the land. The form of the power and the manner of its exercise are left to be agreed upon by the parties. In England the effect of the wide enactment conferring a power of sale is modified by the incorporation of provisions of the Conveyancing Acts, which confer powers of sale, &c., on mortgagees without any mention of these being necessary in the mortgage itself. In Ontario it is contemplated that the terms of the power shall be set out in the mortgage itself, but a short form of power of sale may be used in reliance on the Short Forms of Mortgage Act, and this appears to have the effect of making applicable the provisions of the Mortgages Act. In other jurisdictions the mortgagee has a power of sale without express mention of the power in the mortgage itself being necessary.

The seven Australian jurisdictions and Jamaica [87] may be taken together. The scheme of these statutes is that, on default being made by the owner and continuing for the statutory period of a month, the mortgagee may give the owner notice, and that on default continuing for the further period of a month the power to sell the land at once arises: the mortgagee is authorized to execute a transfer of the land, which on registration vests the owner's interest in the purchaser as though transferred to him by the owner, free from any interests or incumbrances created subsequently to

[85] I. 1891, s. 40, thus incorporating ss. 19-24 of the Conveyancing Act 1881; Tr. 1902, ss. 75, 77, similarly incorporating ss. 21-26 of the Conveyancing Ordinance (1902 No. 72), a transcript of the English ss. 19-24.

[86] Eng. 1875, ss. 22, 26, 27; 1897, s. 9; 1903-8 Rules, r. 159; Own. & Inc. 200; Br. & Sh. 168-174. On. 1914, ss. 30, 31 (2), 34, 35; Short Forms of Mortgage Act (R. S. 1914, c. 117); Mortgages Act (R. S. 1914, c. 112), ss. 19-27.

[87] N. S. W. 1900, ss. 57-59; Q. 1861, ss. 57-59, and 1877, s. 20; S. A. 1886, ss. 132-136; Tas. 1862, ss. 53-55; V. 1915, ss. 146-150; W. A. 1893, ss. 106-110; P. 1913, ss. 48-51; J. 1888, ss. 80-83. Aust. Torr. Syst. 949-953.

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the mortgage. The statutory periods mentioned may be abridged or extended. Provision is also made for the purchaser's protection in paying the purchase money to the mortgagee, and for the disposal of the money in the hands of the mortgagee. In the absence of special clauses in the mortgage limiting different periods of default, or where the owner's right to notice has not been effectually waived (as to which see *ante*, p. 220), the efficacy of the sale depends on the strict observance of the statutory requirements.

The New Zealand [88] statute differs from the Australian statutes in making clauses actually conferring powers of sale an implied part of every mortgage, while other substantive enactments provide for the protection and title of the purchaser. But the practical result is apparently the same as in the Australian jurisdictions. It is also expressly provided that the power of sale is not to be exercised when there is a sub-mortgage without the consent of the sub-mortgagee.[89]

The scheme in Manitoba, Saskatchewan, and Alberta,[90] resembles that of the Australian jurisdictions, but with some important differences. The statutory period to elapse after default and before notice cannot be abridged, though it may be extended, and the further period to elapse before the power to sell is complete cannot be altered at all. The mortgagee's notice, besides being served on the owner and other persons having registered interests, must be filed or registered. In Manitoba, leave to sell must first be applied for and granted by the registrar, and if sale without notice is expressly stipulated for in the mortgage, the registrar may direct a sale without any notice being served; certain mortgages effected before the year 1914 are specially provided for. The sale itself must, in all three jurisdictions, be made on terms directed by the registrar. In Saskatchewan and Alberta the mortgagee has the alternative right of taking ordinary proceedings in court to "enforce" his rights under the mortgage, and in particular for sale of the land. It is not clear, however, under what circumstances sale by order of court would be more beneficial than a sale under the statutory power.

In the three remaining jurisdictions—Fiji, Federated Malay States, Leeward Islands [91]—a mortgagee is allowed, as part of his security, to have the land sold, but the sale is carried out by the

[88] N. Z. 1915, ss. 103, 107-109, sch. 4, cl. 7, 8.

[89] N. Z. 1915, s. 116 (4).

[90] M. 1913, ss. 118-121, 121A; Sas. 1917, ss. 109-111; Al. 1906, ss. 62, 62A (2-9). See Can. Torr. Syst. 317-346.

[91] Fi. 1876 (1906), ss. 63-71; F. M. S. 1911, ss. 46-53; L. Is. 1886 (1914), ss. 71-94.

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urt after preliminary steps as to notice on default, &c., have been ken by the mortgagee, just as in Australian jurisdictions. In ji and Federated Malay States the two periods of default are, der the statutes, one month each, but any other periods may be nited; in Leeward Islands the periods are sixty and thirty days, d no provision is made for any alteration in these. The pur-aser at the sale is subsequently registered as owner. In Fiji . 71) and Federated Malay States (s. 53) the title of the pur-aser is specially warranted, and made as good "as if he had been e original grantee" from the State.

The statutory power of sale in the nineteen jurisdictions—no ch power being conferred in North-West Territories—thus ap-ars to be, notwithstanding differences in detail, essentially the me; it is a power in the mortgagee to vest, directly or indirectly, a purchaser that ownership of the land which is still in the owner mself and has not passed to the mortgagee (*ante*, p. 207). The arest analogy in the general law of unregistered land is the vest-g by order of court, where an equitable mortgagee takes proceed-gs for sale; this procedure is actually necessary under the statu-ry mortgage in North-West Territories, and may be adopted in skatchewan and Alberta.

As in other parts of the law relating to registered land, the se law as laid down in some jurisdictions occasionally corresponds th actual statutory enactment in others, or an enactment may erely express what would be implied without express enactment. us, where default is made in payment of interest on an instal-nt of principal, so that the power of sale becomes exercisable and e land is sold under it, the mortgagee may retain out of the pur-ase money the whole of the principal, although by the terms of e mortgage the principal is not yet due.[92] It does not follow that e mortgagee can formally call up the principal on default in yment of interest, and prompt payment of the interest due would event the power of sale arising.[93] In Manitoba and Saskatche-n[94] it is expressly enacted that, where by reason of an owner's fault the whole principal becomes payable, the arrears due may paid at any time before sale or foreclosure. Case and statute w correspond also with respect to the interest taken by the pur-aser; the purchaser from the mortgagee takes not only the actual

[92] *Herrey* v. *Inglis* (1868) 5 W. W. & a'B. 125; *Ewart* v. *General nance Soc.* (1889) 15 V. L. R. 625; Q. 1877, s. 20; P. 1913, s. 49.

[93] *Burne* v. *Stuart* (1884) 3 N. Z. S. C. 247; *Ewart* v. *General Finance c., supra.*

[94] M. 1913, s. 126; Sas. 1917, s. 115; *Wasson* v. *Harker* (1912) 22 est. R. 609 (Sas.).

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estate of the owner, but any estate or interests which the owner had power to dispose of.[95]

The requirements of the statutes—either express or as incorporated from general statutes—with respect to the notice to be given by the mortgagee upon default being made by the owner, must be strictly complied with.[96] In particular the notice must state what the default is, and not merely in general terms require the conditions of the mortgage to be observed;[97] it is however sufficient to identify the debt, if the notice be a demand for payment, notwithstanding a mistake in its description.[98] As already stated (*ante*, p. 221), the notice is not invalid merely for being given prior to the registration of the mortgage. The statutes differ slightly as to the form of notice, and in nine jurisdictions—New South Wales, South Australia, Tasmania, New Zealand, Fiji, Federated Malay States, Manitoba, Saskatchewan, Alberta—the notice, besides requiring payment or observance of covenants, must also state the intention to exercise the power of sale. In Victoria and Western Australia it is specially enacted that, where the money secured is made payable on demand, the demand is to be equivalent to the ordinary statutory notice, and one such demand or notice is sufficient.[99] In other jurisdictions, as formerly in Victoria and Western Australia under repealed statutes, two notices or demands would seem to be necessary when the money is by the mortgage instrument made payable on demand—one creating the default and the other answering to the statutory notice after default.[1]

The effect of the exercise of the power of sale upon the covenants for payment is referred to *ante*, p. 240. When the covenants for payment cannot be availed of by reason of the statutory period under limitation Acts having run out as against the mortgagee, the

[95] V. 1915, s. 150; W. A. 1893, s. 110; J. 1888, s. 83; *Ex p. Newcastle Build. Co.* (1905) 5 S. R. (N. S. W.) 237, a case of foreclosure, but applicable in principle to sale.

[96] *National Bank of Australasia* v. *United Hand-in-Hand Co.* (1879) 4 A. C. 391, 407; *In re Burton* (1901) 27 V. L. R. 437; *Smith* v. *National Trust Co.* (1912) 45 Can. S. C. R. 618; *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575.

[97] *McDonald* v. *Rowe* (1872) 3 V. R. 143; *Stacey* v. *Hansen* (1894) 20 V. L. R. 561; Aust. Torr. Syst. 950.

[98] *Barns* v. *Queensland National Bank* (1906) 3 C. L. R. 925, 935.

[99] V. 1915, s. 147; W. A. 1893, s. 107.

[1] *National Bank of Australasia* v. *United Hand-in-Hand Co.* (1879) 4 A. C. 391, 406, under the Victorian Act of 1866 before amendment, ss. 84 and 85 being now reproduced in V. 1915, ss. 146, 148. An illustration of a demand mortgage is *Mathieson* v. *Mercantile Finance Co.* (1891) 17 V. L. R. 271.

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power of sale may still, at all events where the mortgagee has taken and kept possession, be exercised.[2]

The statutes are precise in providing that the owner's property in the land is not vested in the purchaser until the latter is placed on the register.[3] Until this registration does take place the purchaser appears to be as amenable to notice of defects in the title of his transferor the mortgagee as he would be if the transfer were being made by the owner himself.[4] But the mortgagor is bound by the execution of a valid contract between the mortgagee and the purchaser, and cannot come in and redeem after the contract of sale on the mere ground that the purchaser is not yet registered as owner.[5] Any right to relief which the mortgagor would otherwise have against the effect of an acceleration clause, as in Manitoba and Saskatchewan,[6] would seem to be abrogated when once a valid contract for sale has been entered into by the mortgagee. The precise interest in the land that does vest in the purchaser is of course the owner's interest as it was at the time of the registration of the mortgage; this is expressly stated in most of the statutes, but must necessarily be implied.[7] The purchaser will, when registered, take free of any unregistered transactions in the same way and to the same extent as if he were a transferee direct from the registered owner.[8]

Registration of the transfer to the purchaser will not usually be permitted until satisfactory evidence has been produced at the registry as to the occurrence of the owner's default, and other circumstances supporting the validity of the sale by the mortgagee: only in New South Wales is it expressly enacted that proof shall be furnished that the "default has been made and continues"—which means "continues up to the date of the contract of sale."[9] But it has been held that, apart from this enactment, it is proper

[2] *In re Australian Deposit Bank* [1907] V. L. R. 348.

[3] *National Bank of Australasia* v. *United Hand-in-Hand Co.*, *supra*; *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575; *Finkelstein* v. *Locke* (1907) 6 West. R. 173 (Man.). In all these cases the sale itself was invalid for irregularities.

[4] Aust. Torr. Syst. 952; *ante*, p. 126, "Notice;" *Barns* v. *Queensland National Bank* (1906) 3 C. L. R. 925, 945.

[5] *Saltman* v. *McColl* (1909) 12 West. R. 146, 14 *ib.* 91; Can. Torr. Syst. 333, 334.

[6] M. 1913, s. 126; Sas. 1917, s. 115.

[7] See Eng. 1875, s. 27; *In re Richardson* (1871) L. R. 12 Eq. 398, 13 Eq. 142. On. 1914, s. 35; *Beatty* v. *Bailey* (1912) 26 O. L. R. 145.

[8] An illustration is *Potter* v. *Sampson* (1913) 2 Tr. & Tob. 274, where the purchaser took in priority to an unregistered agreement dated subsequently to the registration of the mortgage.

[9] N. S. W. 1900, s. 59; *Ex p. Hassoll* (1871) 10 S. C. (N. S. W.) 292.

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for the registry to require such proof, and this appears to be the ordinary practice.[10] An exception occurs in Victoria and Trinidad-Tobago, where it is expressly enacted that a transfer made in professed exercise of the mortgagee's power of sale may, in the discretion of the registrar, be registered without proof that the power has been duly exercised; and in New Zealand the transfer on a judicial sale is "conclusive proof" that the sale has been duly exercised.[11] The same rule as to requiring evidence of default, &c., is illustrated in those jurisdictions where the sale has to be carried out in accordance with directions from the registry; before directing a sale at all, the registrar may require to be satisfied that the mortgagee is entitled to sell.[12]

All the enactments relating to powers of sale (whether contained in the registration statutes, or incorporated from other statutes) include provisions, substantially to the same effect, as to the disposal of the purchase money received by the mortgagee.[13] The provision for this is least explicit in the case of the Leeward Islands, whilst in England, Ireland, Queensland, Tasmania, Papua, and Trinidad-Tobago, nothing is said as to payment of any surplus to subsequent incumbrancers; this omission however seems unimportant, and in any jurisdiction a subsequent incumbrancer would be entitled to stand in the shoes of the owner-mortgagor as in the case of mortgages over unregistered land. The rights of other creditors among themselves to take the surplus may also be governed by general legislation.[14] General principles of the law of mortgage will also be applied, notwithstanding the silence of the registration statutes, to secure to the mortgagee the repayment of necessary outlay in preserving his security.[15]

In the event of the sale being made improperly, the owner (if the purchaser be already registered without notice of the irregularity) has the same remedy by way of action for damages against the mortgagee as under the general law.[16]

[10] *Ex p. Hassall, supra,* at p. 299; *National Bank of Australasia* v. *United Hand-in-Hand Co.* (1879) 4 A. C. 391, 407 (referring both to the New South Wales and (repealed) Victorian statutes); Guest's Transfer of Land Act, 106; Aust. Torr. Syst. 952.

[11] V. 1915, s. 148; Tr. 1902, s. 77; N. Z. 1915, s. 113.

[12] *Re Sun Life Ass. Co. and Widmer* (1916) 33 West. R. 521 (Al.).

[13] Aust. Torr. Syst. 950, 953; Can. Torr. Syst. 337-341.

[14] *Thampson* v. *Berglund* (1910) 16 West. R. 154 (Sas.); Can. Torr. Syst. 339.

[15] *National Bank* v. *Barclay* (1899) 17 N. Z. R. 819; Aust. Torr. Syst. 953.

[16] *Campbell* v. *Bank of New South Wales* (1879) 2 N. S. W. 271, 381 (P. C.); *Gunn* v. *Land Mortgage Bank* (1890) 12 Aust. L. T. 49; *Barns* v. *Queensland National Bank* (1906) 3 C. L. R. 925, 945; *Pendlebury* v. *Colonial Mutual Ass. Co.* (1912) 13 C. L. R. 676.

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6. *Right to foreclose.* In Ireland foreclosure is in practice but seldom resorted to. This may account for the silence of the registration statute, which does not mention foreclosure; moreover, though the rights and remedies of mortgagees under the Conveyancing Acts are by I. 1891, s. 40, made applicable to registered land, s. 25 of the Conveyancing Act 1881—the only section of that Act which mentions foreclosure—does not apply to Ireland. Presumably a foreclosure order absolute made by a competent court would be regarded as sufficient authority for rectification of the register.[17] There are four other jurisdictions in which the registration statutes do not mention foreclosure—New Zealand, Fiji, Federated Malay States, Leeward Islands; but in each of these provision is made for judicial sale of the land, and the mortgagee is expressly authorized to bid at the sale and become the registered owner of the land free from any right of redemption by the former owner.[18]

In six of the remaining jurisdictions foreclosure by means of ordinary judicial proceedings is provided for, in seven a special statutory procedure is introduced, and in two foreclosure may be had either by ordinary proceedings or by the statutory procedure. In Victoria, Western Australia,, and Jamaica,[19] the alternative of ordinary or statutory procedure applies to mortgages existing at the time of initial registration, and to these only.

The six jurisdictions in which foreclosure by action or other proceeding in the courts only is provided for are: England, Ontario, Queensland, Papua, Trinidad-Tobago, North-West Territories.[20] In England and Ontario the mortgagee may "enforce" foreclosure as though "the land had been transferred to him by way of mortgage subject to a proviso for redemption," and on presentation of the order for foreclosure absolute the mortgagee is registered as owner of the land.[21] In Queensland and Papua the mortgagee is merely entitled by proceedings in the ordinary courts "to foreclose the right of the mortgagor" to redeem, and the enactment in North-West Territories is to the same effect. In

[17] I. 1891, s. 39, seems to be a relevant enactment, if definite statutory authority be required.

[18] N. Z. 1915, ss. 110-115; Fi. 1876 (1906), ss. 63-71; F. M. S. 1911, ss. 46-53; L. Is. 1886 (1914), ss. 71-94. Foreclosure is no longer allowed in New Zealand, even in the case of unregistered land: Property Law Act 1908 (No. 152), s. 69. As to Federated Malay States, see Innes, 33, 36.

[19] V. 1915, ss. 168-174; W. A. 1893, s. 124; J. 1888, s. 109.

[20] Eng. 1875, s. 26; 1903-8 Rules, r. 164. On. 1914, s. 34; 1911 Rules, r. 27 (4). Q. 1861, s. 60. P. 1913, s. 52. Tr. 1902, ss. 75, 78. Can. 1906, s. 99.

[21] Own. & Inc. 198-200.

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Trinidad-Tobago the right to foreclosure is only given by implication, i.e., by conferring all ordinary rights of a mortgagee, and enacting that the mortgagee is to be registered as owner "on the registration of a final order of foreclosure."

These enactments are substantially the same in their effect. The word "foreclosure" is used in the sense in which it is used when an equitable mortgagee who has a mere charge (as by deposit of deeds, &c.) over unregistered land takes foreclosure proceedings and obtains an order for the land to be conveyed to him—the legal estate being in the mortgagor.[22] But whilst in England, Ontario, and Trinidad-Tobago the foreclosure order itself is (under the statutes or rules) sufficient authority for the mortgagee to be entered on the register as owner,[23] in North-West Territories a vesting order (which may be contained in the foreclosure order) is necessary;[24] in Queensland and Papua such a vesting order can only be had in case of the refusal of the owner to convey or transfer to the mortgagee, a direction for such conveyance or transfer being inserted in the foreclosure order.[25]

The special statutory procedure for obtaining foreclosure is to be found in New South Wales, South Australia, Tasmania, Victoria, Western Australia, Jamaica, and Manitoba.[26] In these seven jurisdictions an ordinary action for foreclosure cannot be brought by the mortgagee, and the statutory method must be adopted.[27] This method is shortly as follows:[28] After six months' default by the owner, the mortgagee (having unsuccessfully offered the property for sale) makes formal application to the registry for an order of foreclosure, and upon this order being issued and registered the mortgagee becomes the registered owner of the land. In effect, the land is transferred by the owner to the mortgagee, and the latter is thus perhaps in a better position than if an action of foreclosure had been brought and completed by a vesting order or

[22] See *James* v. *James* (1873) L. R. 16 Eq. 153; *Huntingdon* v. *Inland Revenue Commrs.* [1896] W. N. 9.

[23] See *Weymouth* v. *Davis* [1908] 2 Ch. 169.

[24] *Colonial Invest. Co.* v. *King* (1902) 5 Terr. R. 371, stated in Can. Torr. Syst. 308, 309.

[25] *British and Australasian Co.* v. *South Queensland Pastorate Co.* (1894) 6 Q. L. J. 83; *Wilson* v. *Brown* (1896) 7 Q. L. J. 16.

[26] N. S. W. 1900, ss. 61, 62; S. A. 1886, ss. 140-142; Tas. 1862, ss. 121, 122; V. 1915, ss. 151, 156, 161, 162; W. A. 1893, ss. 111, 116, 121, 122; J. 1888, ss. 84, 89, 94, 95; M. 1913, ss. 114, 116, 122-124, 126.

[27] *Greig* v. *Watson* (1881) 7 V. L. R. 79; *Long* v. *Town* (1889) 10 N. S. W. Eq. 253; *Re Alaric and Frechette* (1913) 25 West. R. 648 (Man.).

[28] Aust. Torr. Syst. 953-961; Can. Torr. Syst. 319 *et seq.*, 341 *et seq.*

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a foreclosure order absolute being registered. The statutory requirements as to service of notice, &c., must of course be strictly complied with.[29] And mere compliance with the letter of the statutes is not always sufficient, the registrar having a judicial discretion and being bound to act on the general equitable principles relating to foreclosure and redemption: thus, a mortgagee who is the trustee of the mortgagor may be refused a foreclosure order.[30]

In three of the above-mentioned jurisdictions—Victoria, Western Australia, Jamaica[31]—provision is made (expressly in Victoria and impliedly in Western Australia and Jamaica) for giving a mortgagee whose mortgage was created prior to initial registration, and is not therefore in statutory form, the choice of foreclosing by ordinary action in the courts or by the statutory procedure. In all cases the mortgage must have been entered on the register as an incumbrance, and in Victoria it must be "a legal mortgage."

In the remaining two jurisdictions—Saskatchewan and Alberta[32]—the mortgagee may either proceed by ordinary action for foreclosure (as in North-West Territories), or may adopt the statutory procedure (as in Manitoba). It has been said that these are merely alternative methods of procedure, and that any jurisdiction possessed by the courts, as for instance in re-opening foreclosure, can be exercised equally whichever procedure is adopted.[33] The express provisions of some statutes by which a mortgagee after foreclosure is placed in the position of a transferee apply (if read literally) only to the statutory method of foreclosure.

The mortgagee may have the full ownership or fee simple vested in him by his registration or foreclosure, even though the mortgagor was not the owner in fee. The mortgaging owner may have only a life estate, with a power of appointment over the fee, but on foreclosure the whole interest in the land that might have been the subject of an assurance by the mortgagor will become vested in the mortgagee, who will be registered as owner accordingly.[34]

The title conferred on the mortgagee by his being registered as owner of the land after foreclosure appears to be substantially the same, whatever the procedure may have been, though perhaps the

[29] *In re Burton* (1901) 27 V. L. R. 437.

[30] *In re National Trustees Co.* (1897) 19 Aust. L. T. 222.

[31] V. 1915, ss. 168-174; W. A. 1893, s. 124; J. 1888, s. 109.

[32] Sas. 1917, ss. 108, 112-114; Al. 1906, ss. 62, 62A (4, 10-16).

[33] *Union Bank of Canada* v. *Eugen* [1917] 2 W. W. R. 395 (Sas.); *Douglas* v. *Mutual Life Ass. Co.* [1918] 1 W. W. R. 239 (Al.)—finally upheld, 57 Can. S. C. R. 243. But see now Al. 1906, s. 62B.

[34] *Ex p. Newcastle Build. Co.* (1905) 5 S. R. (N. S. W.) 237.

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statutory foreclosure is not so readily re-opened as when the procedure has been by action and registration of the order of the court.[35] There is however considerable difference between registered and unregistered land with respect to the result of foreclosure. This arises partly from the fact that the title of the mortgagee before and after the foreclosure is completely different in the case of registered land,[36] whilst under the general law the nature of his title in the case of a legal mortgage remains the same to a great extent;[37] it is also partly due to the scheme of the system of registration of title, by which the registered owner has his title warranted irrespectively of the nature of his predecessor's title.

Foreclosure in the case of registered land cannot be re-opened as may be done—almost as a matter of course—under the general law,[38] though in some jurisdictions there is express legislation on the subject.[39] Independently of this legislation, a purchaser from a mortgagee who has foreclosed and become the registered owner of the land is as fully protected as any other purchaser.[40] With respect to the right of the mortgagor to re-open a foreclosure as against the mortgagee-owner himself, the rule has been laid down differently in different jurisdictions. Under the Australian system of statutory foreclosure, a foreclosure duly completed cannot be re-opened at the mere wish of the mortgagor.[41] Where the statutory system is not in force, and where foreclosure can be had both by the statutory method and under the equity jurisdiction of the

[35] *Colonial Invest. Co.* v. *McManus* [1918] 1 W. W. R. 561.

[36] See *Matton* v. *Lipscomb* (1895) 16 N. S. W. Eq. 142, 147; *Ex p. Newcastle Build. Co., supra.*

[37] For the difference, see *Heath* v. *Pugh* (1882) 6 Q. B. D. 345, 7 A. C. 235.

[38] *Campbell* v. *Holyland* (1877) 7 Ch. D. 166.

[39] In Victoria, even in the case of unregistered land, foreclosure cannot now be re-opened: Conveyancing Act 1915, s. 32 (see V. 1915, s. 162, Appx. *post*). In Trinidad-Tobago foreclosure of registered land cannot be re-opened "as against any subsequent transferee," &c.. Tr. 1902, s. 78.

[40] *Richards* v. *Thompson* (1911) 18 West. R. 179 (Sas.); *Williams* v. *Box* (1910) 44 Can. S. C. R. 1, 9.

[41] *Campbell* v. *Bank of New South Wales* (1883) 16 N. S. W. Eq. 285, 11 A. C. 192; *In re Premier Perm. Build. Assoc.* (1899) 25 V. L. R. 77, 80; *Fink* v. *Robertson* (1907) 4 C. L. R. 864; Aust. Torr. Syst. 960. In *In re Premier Perm. Build. Assoc*, the application to registered land of the general rule laid down in *Campbell* v. *Holyland* (*supra*) is expressly denied, and *Campbell* v. *Bank of New South Wales* is recognized as authoritative on this question. *Fink* v. *Robertson* overruled *In re Premier Perm. Build. Assoc.* on the actual point decided, though not on the general principle, and leave to appeal was refused by the Privy Council: Times, 29 July 1907. In Manitoba the section (M. 1902, s. 126) on which *Williams* v. *Box* (1910, 44 Can. S. C. R. 1) was decided (re-opening foreclosure) is omitted from the present statute.

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courts, the rule against re-opening foreclosure is not perhaps so stringent; but the cases are not uniform.[42]

With respect to the effect of proceedings being taken by the mortgagee, which in the case of unregistered land would have the effect of re-opening the foreclosure, the general rule in the case of registered land is probably the same; but the right of the mortgagee to sue on the covenants and take other proceedings has been abrogated in some jurisdictions,[43] so that cases in which re-opening of the foreclosure would result will be correspondingly less numerous.[44]

When the debt has been extinguished by the foreclosure—as in Australia, any right of action against a surety would seem to be no longer available. This is expressly enacted in Victoria,[45] but seems to follow from the judicial decision which anticipated the new rule laid down by statute.[46] The same enactment in Victoria expressly preserves all other remedies of the mortgagee, except his right to sue the mortgagor or a surety for the debt; thus the collateral right to policy moneys might perhaps remain enforceable, as now decided in Canada.[47] If the mortgagee, in the Canadian jurisdictions, obtains judgment for the debt before foreclosure, he can usually issue execution notwithstanding completion of the foreclosure;[48] the same rule would seem to hold in Victoria and other jurisdictions. In Alberta an action on the covenant or execution under a judgment cannot now be proceeded with until after sale, and foreclosure operates as a full satisfaction of the debt.[49]

Leasehold land, as well as freehold, may of course be the subject of foreclosure. There are however few references to mortgaged leasehold in the statutes, and these mostly relate to the effect of the mortgagor becoming bankrupt, &c.; in Western Australia the con-

[42] In *Colonial Invest. Co.* v. *King* (1902, 5 Terr. R. 371) the right to re-open after foreclosure by Court proceedings was denied; in *Colonial Invest. Co.* v. *McManus* [1918] 1 W. W. R. 561 (Sas.) this right was affirmed. In *Williams* v. *Box* (*supra*) the foreclosure (statutory) was re-opened, under s. 126 of M. 1902, now repealed.

[43] See *Fink* v. *Robertson* (1907), 4 C. L. R. 864, and as to variance between Australia and Canada, *ante*, p. 240.

[44] See *Orser* v. *Colonial Invest. Co.* [1917] 3 W. W. R. 523 (Sas.); *Noble* v. *Campbell* (1911) 18 West. R. 591 (Man.); *Isman* v. *Sinnott* [1919] 2 W. W. R. 61 (Sas.). Reopening of foreclosure was refused in *Credit Foncier* v. *Redekopc* [1919] 2 W. W. R. 158 (Sas.).

[45] Conv. Act 1915, s. 32 (see V. 1915, s. 162, Appx. *post*). This legislation has been followed, and carried further, in British Columbia: Sect. 3 *post*, p. 277; B. C. 1911, s. 14A. See too, now, as to Alberta, Al. 1906, s. 62B.

[46] *Fink* v. *Robertson*, *supra*.

[47] *Mutual Life Ass. Co.* v. *Douglas* (1918), 57 Can. S. C. R. 743.

[48] *Orser* v. *Colonial Invest. Co.*, *supra*.

[49] Al. 1906, ss. 62 (2), 62B; *Security Trust Co.* v. *Sapre* [1919] 2 W. W. R. 863 (Al.).

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sent of the minister for lands is necessary in the case of a Crown lease, before a foreclosure order can be made.[50]

7. *Right to deal with mortgage security.* In all twenty jurisdictions the mortgagee is, either expressly or by the plainest implication, authorized to transfer his mortgage,[51] though only in five—England, Ontario, New Zealand, Manitoba, Saskatchewan[52]—do the statutes or rules refer to the right to sub-mortgage.

In England, Ireland, and Ontario,[53] transfers of mortgage—the word used being "charge"—are expressly authorized by the statutes, and are dealt with both in statutes and rules, and some express provision (though different in each) is made with respect to the title acquired by the transferee. In all three registration is essential to the vesting of the mortgage in the transferee. In England the provisions generally relating to transfer of mortgage are elaborate in detail, but omit the express warranty of title[54] which is given to the transferee in Ireland and Ontario. In Ireland the transferee gets "the same title to the charge as a registered transferee of land . . . has to the land." In Ontario the transferee gets "the ownership of the charge free from any unregistered interests therein." In England it is merely enacted that "a registered transferee for value" is not "affected by any irregularity or invalidity in the original charge itself, of which" he was "not aware." Both in England[55] and in Ontario, though not in Ireland, provision is made for transfer of part of the money secured by a mortgage. In England[56] provision is also made for the registration of new

[50] N. S. W. 1900, s. 91; S. A. 1886, s. 173 (2); Tas. 1862, s. 77; V. 1915, s. 137; W. A. 1893, s. 97, and 1909, s. 7; J. 1888, s. 76.

[51] In general the same considerations apply to mortgages as to land, with respect to the necessity for registration and the effect of unregistered instruments and transactions: "Unregistered transactions" *ante*, p. 111.

[52] Eng. 1903-8 Rules, rr. 178-181; Own. & Inc. 121; Prec. Reg. Land, 146. On. 1911 Rules, r. 28. N. Z. 1915, s. 116 (4, 5). M. 1913, ss. 110, 111. Sas. 1917, s. 122 (4). Can. Torr. Syst. 348. The New Zealand statutes, from which the original of Sas. 1917, s. 122 (4), was evidently taken, formerly contained another reference to sub-mortgages (N. Z. 1885, s. 94, Aust. Torr. Syst. 285, 964; N. Z. 1908, s. 102), but this section was amended (N. Z. 1913, s. 9) and now appears as N. Z. 1915, s. 102. A case under the repealed enactment is *Pott* v. *Taranaki Dist. Registrar* (1906) 26 N. Z. R. 141, referred to later on as applicable in Saskatchewan and Manitoba (note 67).

[53] Eng. 1875, s. 40; 1897, s. 9 (4, 6); 1903-8 Rules, rr. 151, 157, 168, 174, 178-181, f. 49. I. 1891, s. 41; 1910 O. 4, r. 1; f. 11. On. 1914, s. 54; 1911 Rules, r. 28; f. 29.

[54] As to mortgages and warranty of title, see sect. 1 *ante*, p. 195; "Forgery" *ante*, p. 143.

[55] Eng. 1903-8 Rules, r. 157, which by r. 174 applies to "charges."

[56] Eng. 1903-8 Rules, r. 151, which by r. 174 applies to "charges;" Own. & Inc. 242, 243.

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owners of a mortgage, where a vesting order or a vesting declaration has been made and a transfer cannot be obtained.

In these three jurisdictions the statutes, rules, and prescribed forms speak only of the transfer of the "charge," and make no reference to assignment of the debt. The statutes do however in effect provide for the due assignment of the debt, by enacting that the covenants for payment are impliedly made by the covenantor with the mortgagee "for the time being," thus enabling the transferee of the mortgage to sue for the debt in his own name.[57]

In New South Wales and Trinidad-Tobago the power to transfer a mortgage is not conferred in so many words, but mortgages are included in the "interests" in land that may be transferred; in the remaining eight Australasian jurisdictions, Federated Malay States, and Jamaica, express permission to transfer a mortgage is given, and in all these twelve jurisdictions the transferee is expressly authorized to sue for the debt in his own name, thus rendering any separate assignment of the debt unnecessary.[58] In Leeward Islands [59] express permission to transfer is also given, and the transferee will "enter into the whole rights of the transferor," nothing being said about the right to sue for the debt. In Manitoba, Saskatchewan, Alberta, and North-West Territories,[60] the enactments are to the same effect as in the majority of the Australasian jurisdictions, with the addition that transfer of part of a mortgage is authorized. In Manitoba a mortgage created prior to initial registration may be assigned and the assignment registered as though in statutory form.

The statute law on transfer of mortgages is thus substantially to the same effect in all twenty jurisdictions. It may be that the case law of one jurisdiction is not always applicable in all. For instance, on the question of the title conferred by registration of a forged transfer of mortgage the law as laid down in England may possibly not hold in every other jurisdiction.[61] The cases on the two points now to be mentioned seem, however, to apply in all jurisdictions.

It has been held in Victoria that registration of the transfer of

[57] Eng. 1875, s. 23; I. 1891, s. 40; On. 1914, s. 31. And see Own. & Inc. 170; Prec. Reg. Land. 149.

[58] N. S. W. 1900, ss. 46, 51, 52; Tr. 1902, ss. 51, 60, 61; Q. 1861, ss. 65, 66; S. A. 1886, ss. 150, 151; Tas. 1862, ss. 63, 64; V. 1915, ss. 121, 122; W. A. 1893, ss. 82, 83; P. 1913, ss. 37, 38; N. Z. 1915, ss. 89, 90; Fi. 1876 (1906), ss. 46-48; F. M. S. 1911, ss. 33-35; J. 1888, ss. 63, 64.

[59] L. Is. 1886 (1914), ss. 64-66.

[60] M. 1913, ss. 106, 109-111; Sas. 1917, ss. 122-124; Al. 1906, ss. 66-68; Can. 1906, ss. 104-107.

[61] See *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47; "Forgery" *ante*, p. 143.

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mortgage is not such notice to the owner of the land as to prevent the application of the equitable rule by which payments to the original mortgagee are to be deemed payments to the transferee when made without notice of the transfer; consequently, the owner of the land is entitled, in an action for redemption against the transferee, to be credited with payments made to his original mortgagee without notice.[62] This rule of law is impliedly enacted in Ontario, where every transfer of mortgage is "subject to the state of account" between the owner of the land and the original mortgagee;[63] but the enactment does not apply to the case of a transferee who takes his transfer without notice that no money at all had in fact been paid to the mortgagor.[64]

It has been held in Australia that the liability of a person who guarantees the mortgage debt is not affected by the statutory assignment of the debt that takes place when a transfer of the mortgage is registered.[65] This statutory assignment does not of itself completely vest the benefit of the guarantor's contingent liability in the transferee of the mortgage, and the extent to which any such vesting does take place depends on the general law of each jurisdiction.[66]

Sub-mortgages, as already stated, are only expressly provided for in England, Ontario, New Zealand, Manitoba, and Saskatchewan (*ante*, p. 261). In England the sub-mortgage is assimilated as closely as possible to a mortgage. In Ontario the sub-mortgage is in actual fact a transfer of mortgage containing an agreement for re-transfer. In the New Zealand statute a sub-mortgage is merely mentioned incidentally, and the consent of the sub-mortgagee made necessary for any discharge, or variation in the terms of the mortgage. In Manitoba and Saskatchewan the sub-mortgagee is given all the powers of a transferee, and the sub-mortgage (though called in Manitoba a "mortgage," and in Saskatchewan a "charge," of a mortgage) is in effect a transfer of the mortgage; the mortgagee, having once given such a sub-mortgage, has no registrable interest that he can transfer after the sub-mortgagee has been registered.[67]

In those jurisdictions in which sub-mortgages are not author-

[62] *Nioa* v. *Bell* (1901) 27 V. L. R. 52; Own. & Inc. 170, 203. The principle of this decision has been followed in Alberta: *Grace* v. *Kuebler* [1917] 1 W. W. R. 1213, affd. 56 Can. S. C. R. 1.

[63] On. 1914, s. 54 (4). [64] *Dodds* v. *Harper* (1916) 37 O. L. R. 37.

[65] *Loxton* v. *Moir* (1914) 18 C. L. R. 360, 366, 377, affg. on this point 13 S. R. (N. S. W.) 143, 155 (*Moir* v. *Loxton*).

[66] *Loxton* v. *Moir*, *supra*.

[67] *Pott* v. *Taranaki Dist. Registrar* (1906) 26 N. Z. R. 141; note 52 *supra*.

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ized by the statutes or rules themselves, there seems no reason why a sub-mortgage should not be created on the model of a mortgage of land; it may also be created by means of an absolute transfer duly registered, constituting the sub-mortgagee the owner of the security, and a collateral unregistered agreement giving the sub-mortgagor the right of redemption.[68] This right can (if desired) be protected by a caveat on the register, and the sub-mortgagor will then have a merely equitable interest protected like other equitable interests from unauthorized disposition on the part of the legal owner (*ante,* p. 186).

8. *Miscellaneous rights.* There are certain rights enjoyed by a mortgagee of unregistered land which accrue to him technically as a result of his receiving a conveyance of the mortgagor's ownership of the land. Some of the registration statutes contain enactments which have been considered necessary in view of the difference between the old and the new methods of securing the debt on the land. These enactments relate to such matters as the custody of the owner's certificate of title, restrictions on the authority of the owner to deal with the mortgaged property, the effect of future or further advances by the mortgagee, &c. In some jurisdictions where the statutes are silent these points have been the subject of decision by the courts, in others they are still at large both as regards statute and case law.

The question of the mortgagee having the custody of the owner's certificate of title is referred to in the statutes of eight jurisdictions only, and the enactments are not in agreement. In England the mortgagee, "subject to any stipulation to the contrary," is not entitled to this custody;[69] in practice he will usually stipulate for it, and so (it is believed) in other jurisdictions where there is no statutory prohibition against the certificate being handed over to the mortgagee.[70] In North-West Territories and Leeward Islands [71] the owner is also entitled to the custody of his certificate of title, though apparently there is nothing to prevent the mortgagee from stipulating for it. But in New Zealand the mortgagee "or first mortgagee for the time being" is "entitled to the possession of" the owner's certificate of title, and it may also "by agreement be deposited" at the registry for safe custody.[72] In Mani-

[68] Prec. Reg. Land, 146; Aust. Torr. Syst. 796, 964, 972; Conv. Prec. 165, 167. [69] Eng. 1897, s. 8 (4); Own. & Inc. 160, 366.

[70] Aust. Torr. Syst. 923, 948.

[71] Can. 1906, s. 97; L. Is. 1886 (1914), s. 49.

[72] N. Z. 1915, s. 121. This enactment was relied on as strengthening the mortgagee's rights in *Campbell* v. *Auckland Dist. Registrar* (1910) 29 N. Z. R. 332.

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toba, Saskatchewan, and Alberta,[73] neither owner nor mortgagee is entitled to hold the owner's certificate of title, but it is deposited at the registry and there retained "on behalf of all persons interested in the land."

The right of the mortgagee to bargain for the custody of the owner's certificate of title is impliedly recognized by the statutes of Victoria, Western Australia, and Trinidad-Tobago,[74] and provision is made for its production when required for registration of a subsequent mortgage. In other jurisdictions the case of the certificate of title being in the possession of the mortgagee seems to be one that can be dealt with by the registry or the courts under the general powers of compelling production of documents.[75] It has been held, under a repealed Act in Ireland, that the owner's certificate of title is "a proper document for a mortgagee to insist upon having the custody of,"[76] and this seems applicable in other jurisdictions where there is no enactment on the subject.

The registration of the mortgage cannot but affect to some extent, in accordance with the principles of registration of title, the interest taken under a lease made by the owner subsequently to the mortgage. In the majority of the twenty jurisdictions the consent of the mortgagee is expressly required in order to make the lease valid as against him. It may be questioned, however, whether any such express enactment is necessary in view of the provisions of the statutes giving priority to transactions already on the register. In three jurisdictions—Ireland, Manitoba, Leeward Islands—the statutes contain no special reference to the subject of leasing land in mortgage. In England and Ontario—where "notice" only and not the lease itself is registered—the lease has no effect as an incumbrance against incumbrances already registered, unless (in England) the lease is otherwise binding on the prior incumbrancer; nothing however is said in the statutes about the surrender of such a lease.[77]

In the remaining jurisdictions the consent of the mortgagee is essential to the lease being valid against him. In Queensland there

[73] M. 1913, s. 127; Sas. 1917, s. 101; Al. 1906, s. 71. There is a similar enactment in British Columbia (B. C. 1911, s. 20A), although no provision is made for mortgages in statutory form.

[74] V. 1915, ss. 83, 84, 166; W. A. 1893, s. 127; Tr. 1902, s. 83. The contrary is suggested as the proper practice in Ireland: Bro. & Gl. 137.

[75] Aust. Torr. Syst. 948, 949; Can. Torr. Syst. 116; *Registrar-General* v. *Wright* (1917) 23 C. L. R. 214; *Anthony* v. *Speed* [1917] S. A. R. 110.

[76] *Ex p. Rooney* (1874) I. R. 9 Eq. 89, under the Record of Title Act (Ireland) 1865 (c. 88).

[77] Eng. 1875, s. 50; 1903-8 Rules, r. 203; Own. & Inc. 121, 234-237. On. 1914, s. 70.

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is no enactment making the consent of the mortgagee essential to the validity of a surrender of the lease,[78] but in the other jurisdictions—eight Australasian, Federated Malay States, Trinidad-Tobago, Jamaica, Saskatchewan, Alberta, North-West Territories[79]—the consent of the mortgagee is essential (except in Trinidad-Tobago, so far as the Conveyancing Ordinance applies) both to lease and surrender. The consent of the mortgagee given prior to registration of the lease has the same effect as if the mortgage had been registered after and subject to the lease.[80]

In Victoria, Western Australia, and Jamaica,[81] the statutes contain enactments not found in other jurisdictions with reference to moneys received by owner or mortgagee (in Victoria and Jamaica "first mortgagee") as the result of litigation relating to the mortgaged property. These moneys (if recovered by the owner) the mortgagee may have paid over to himself in reduction of the mortgage debt. The proper interpretation of these enactments is obscure, and they do not seem to have come under judicial consideration; they are connected loosely with the enactments (dealt with further on) which purport to confer on the statutory mortgagee the same rights as are enjoyed by virtue of a mortgage conveying the legal estate in unregistered land, but the rights conferred by the enactments now under consideration do not seem to exceed those of a mortgagee in other jurisdictions where these enactments are absent.

The subject of future or further advances by a mortgagee is expressly referred to in the statutes or rules of four jurisdictions only—England, Ireland, Ontario, Leeward Islands.[82] The Leeward Islands statute prohibits a mortgage "for any undetermined sum," only allowing security for sums "expressly stated . . and actually advanced." In England a form is prescribed for a "charge . to secure future advances." In Ireland advances made under a mortgage securing "future advances" are expressly protected against subsequent charges, except as regards advances

[78] Q. 1861, ss. 52, 54.

[79] N. S. W. 1900, ss. 53, 54; S. A. 1886, ss. 118, 123; Tas. 1862, ss. 47, 48; V. 1915, ss. 131, 138; W. A. 1893, ss. 91, 98; P. 1913, ss. 41, 43; N. Z. 1915, ss. 95, 96; Fi. 1876 (1906), ss. 49, 56; F. M. S. 1911, ss. 36, 42; Tr. 1902, ss. 67, 70; J. 1888, ss. 70, 77; Sas. 1917, ss. 92, 97; Al. 1906, ss. 54, 59; Can. 1906, ss. 88, 93.

[80] *Bacchus Marsh Brick Co.* v. *Federal Build. Soc.* (1896) 22 V. L. R. 181.

[81] V. 1915, ss. 158-160; W. A. 1893, ss. 118-120; J. 1888, ss. 91-93.

[82] Eng. 1903-8 Rules, r. 160; I. 1891, s. 77; On. 1914, s. 30 (6), incorporating by reference s. 74 of the Registry Act (R. S. 1914, c. 124); L. Is. 1886 (1914), s. 44.

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made after the date of the subsequent charge "and with express notice in writing of" it; in Ontario the general enactment embodied in the registration statute is to the same effect.

The enactments in Ireland and Ontario seem to state the law on the subject of future advances as it would be held to be in the other jurisdictions, except Leeward Islands. Shortly, the rule seems to be that further advances by a mortgagee cannot ordinarily be made so as to gain priority over subsequent registered mortgages, but advances under a mortgage which expressly secures future advances may gain priority if made without notice of any subsequent mortgage, even though the latter be registered or protected by caveat.[83]

Insurance of crops against hail by a mortgagee is expressly provided for in Saskatchewan.[84] But such an enactment seems merely declaratory, and the mortgagee in other jurisdictions would seem to have a similar right.

9. *General rights as under the ordinary law of unregistered land.* In some jurisdictions the rights of a mortgagee under a statutory mortgage are defined by reference merely to the rights enjoyed by a mortgagee of unregistered land who has the legal estate conveyed to him. In others the detailed powers conferred by the statutes are supplemented by a general reference to legal estate mortgages. In the majority of statutes these references to the analogy of the general law are altogether absent. On the whole, such references seem to afford little real help in determining what are the precise rights conferred on a statutory mortgagee.

The two jurisdictions in which this legislation by reference has been carried furthest are Ireland and Trinidad-Tobago.[85] In Ireland the statutory mortgage will "operate as a mortgage by deed within the meaning of the Conveyancing Acts," and the mortgagee has "all the rights and powers of a mortgagee under a mortgage by deed." The Trinidad-Tobago enactments, though differently worded, are to the same effect.

In England [86] the provisions of the Conveyancing Acts relating to mortgages are made to "apply to registered charges," and this apparently has the same effect as the Irish enactment. In Ontario

[83] Own. & Inc. 203; Aust. Torr. Syst. 963; Can. Torr. Syst. 193; *Queensland Trustees* v. *Registrar of Titles* (1888) 5 Q. L. J. 46, 51; *Nioa* v. *Bell* (1901) 27 V. L. R. 82; *Peck* v. *Sun Life Ass. Co.* (1905) 1 West. R. 302 (B. C.); *Bain* v. *Pitfield* (1916) 33 West. R. 681 (Man.); *Grace* v. *Kuebler* [1917] 1 W. W. R. 1213 (Al.), affd. 56 Can. S. C. R. 1.

[84] Sas. 1917, s. 106.

[85] I. 1891, s. 40; Bro. & Gl. 153. Tr. 1902, ss. 75, 77.

[86] Eng. 1897, s. 9 (1, 2).

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in a similar way portions of general statutes relating to mortgages of unregistered land are incorporated in the registration statutes and made to apply to statutory mortgages.[87] And in all three jurisdictions relevant provisions of conveyancing statutes will often apply, apart from express incorporation.[88]

In New South Wales the mortgagee is empowered to enter into possession, distrain, and bring ejectment, as though he had "a conveyance of the legal estate"; this enactment has been relied on as authorizing the mortgagee to make a lease of the land.[89] There are similar enactments in Victoria, Western Australia, and Jamaica, but though the mortgagee is empowered to enter into possession, distrain, and bring ejectment, the words "assurance of the legal estate" refer only to the right to bring ejectment; under these enactments the mortgagee cannot eject a person in possession under the owner prior to the mortgage without a previous demand for possession.[90]

The detailed powers of mortgagees are supplemented by very wide enactments, in Victoria, Western Australia, Jamaica, and Manitoba,[91] purporting to confer the rights enjoyed by mortgagees under the general law. In Victoria and Manitoba these rights are conferred on "first" mortgagees only, but on "mortgagees" generally in Western Australia and Jamaica; in all four the rights and remedies conferred are those which the mortgagee would have had "if the legal estate in the land or term mortgaged had been actually vested in him" with a right in the owner or mortgagor of quiet enjoyment until default. In addition to this, in Victoria, Western Australia, and Jamaica, the mortgagor may not commence any "action at law"—which includes "suit in equity"[92]—in respect of any cause of action for which the mortgagee might sue under the general power above referred to, without the written consent of the mortgagee. Any restriction thus placed on the right of the owner to sue without the mortgagee's consent continues in force until the mortgage is actually discharged on the register.[93] The

[87] On. 1914, ss. 30 (6), 31 (2), referring to the Registry Act and the Short Forms of Mortgages Act.

[88] See *Dodds* v. *Harper* (1916) 37 O. L. R. 37.

[89] N. S. W. 1900, s. 60; *Finn* v. *London Bank of Australia* (1898) 19 N. S. W. 364, 368.

[90] V. 1915, s. 151; W. A. 1893, s. 111; J. 1888, s. 84; *Colonial Bank* v. *Roache* (1870), 1 V R. L. 165.

[91] V. 1915, ss. 156, 157; W. A. 1893, ss. 116, 117; J. 1888, ss. 89, 90; M. 1913, s. 116. See Aust. Torr. Syst. 961, 962.

[92] *Stretlitz* v. *Britnall* (1912) 15 W. A. R. 9.

[93] *Taylor* v. *Wolfe* (1892) 18 V. L. R. 727; *Bree* v. *Scott* (1902) 29 V. L. R. 692, 699.

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mortgagee's consent is not, however, required to actions by the owner against persons who infringe his possessory rights.[94]

The general rights conferred on the mortgagee by the above enactments have been described as "all the rights and remedies which he would have had as owner of the legal estate under the old law, concurrently with a right in the mortgagor to enjoy the mortgaged land quietly until default."[95] But the mortgagee only has these rights and remedies "so long as the security is on foot as a security, and the ownership of the land is consequently vested in the mortgagor"; they do not per se enable him to convey the land away or otherwise extinguish the owner's title, and the statutory provisions relating to sale and foreclosure are paramount.[96]

These enactments have been found useful as facilitating a mortgagee's proceedings to obtain possession of the land. Thus, where the mortgage fixes a time for repayment of the principal, this taken with the statutory right of quiet enjoyment until default, constitutes a re-demise to the owner, so that landlord and tenant proceedings can be taken; but if no time for repayment is fixed, as in a bank mortgage to secure a current account, there is no re-demise, and no notice as in the case of a tenancy for a term is necessary.[97] The registered transferee of the mortgagee cannot take landlord and tenant proceedings unless he is a party to some agreement with the owner, or the latter is estopped from disputing his title.[98]

SUB-SECTION 3—LIABILITIES AND RIGHTS OF THE OWNER OF THE LAND.

The liabilities and rights of the owner of the land in mortgage are of course correlative to the rights and liabilities of the mortgagee, and have for the most part been sufficiently referred to in treating of the mortgagee's rights, &c. (sub-sect. 2 *ante*, p. 236). The mortgagor retains the formal ownership of the land—the scheme of the statutory mortgage being to leave the mortgagor still registered as owner of the land, whilst the mortgagee has express

[94] *Lauch* v. *Ball* (1879) 5 V. L. R. L. 157; *Burwood Land Co.* v. *Tuttle* (1895) 21 V. L. R. 381. The more recent case of *Strelitz* v. *Britnall* (*supra*) is perhaps inconsistent on this point with these cases.

[95] *Commercial Bank* v. *Breen* (1889) 15 V. L. R. 572.

[96] *Smith* v. *National Trust Co.* (1912) 45 Can. S. C. R. 618, 644, 649, 660; *National Bank of Australasia* v. *United Hand-in-Hand Co.* (1879) 4 A. C. 391, 406.

[97] *Commercial Bank* v. *Breen*, *supra*; *Farrington* v. *Smith* (1894) 20 V. L. R. 90; *Equity Trustees Co.* v. *Lee* [1914] V. L. R. 57.

[98] *Cross* v. *McLeod* (1894) 20 V. L. R. 399.

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powers conferred on him for making his security effective. This difference from the mortgage by conveyance of the land to the mortgagee, under the general law, results in some difference in the rights of the owner as compared with the rights of a mortgagor of unregistered land. This difference appears chiefly in connexion with the owner's right to deal with the mortgaged land, and with his right to "redeem" or have the land discharged of the incumbrance created by the mortgage. The owner has also the right to enter a caveat against the improper exercise of his powers by the mortgagee.[1]

The right to deal with the land will most commonly be exercised by transferring to a purchaser on sale, by making leases, and by creating a second (or third or fourth) mortgage. The transfer to a purchaser will not affect the mortgagee's rights against the land or against the original owner under the personal covenants; the position of the transferee or purchaser has been referred to *ante* (p. 241). Leases will usually require for their validity the consent of the mortgagee (*ante*, p. 265). A second or other mortgage will be in the same form as the first mortgage and can, as in the case of a sale, be executed by the owner of the land without any permission or consent from the first mortgagee, though the production of the certificate of title will usually be necessary in order to obtain registration of the new mortgage.[2] The rights of the second mortgagee will of course be subject to those of the first. The second mortgagee will not necessarily, by paying the interest due on the prior mortgage, make himself personally liable for the principal.[3] The priority of a new mortgagee who pays off the first may be preserved (as in the case of unregistered land) by taking a transfer of the first mortgage instead of discharging it.[4]

As a statutory mortgage is effected by a charge in lieu of a conveyance, so the release of the land from the incumbrance is effected by a "discharge" of the mortgage in lieu of a reconveyance of the land. This discharge of the mortgage on payment of the money secured is commonly referred to as "redemption," though the words "redeem" and "redemption" are properly applicable only to cases of reconveyance. The owner's right to redeem his land is therefore a right to have the mortgage discharged or removed from

[1] *Davies* v. *Herbert* (1885) 11 V. L. R. 386, 394.

[2] See Aust. Torr. Syst. 923, 964; Own. & Inc. 203. As to mortgagee's custody of certificate of title, and its production, see *ante*, p. 264; as to registration of new mortgage, *ante*, p. 232.

[3] *Burne* v. *Stuart* (1884) 3 N. Z. S. C. 247.

[4] *Mordaunt's Off. Assignee* v. *Gibson* (1914) 33 N. Z. R. 1423.

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the register, and this is a legal, not a merely equitable, right.[5] The statutes in all twenty jurisdictions make provision for this discharge or removal with some differences in detail.

In England, Ireland, and Ontario,[6] the cessation or satisfaction of the charge created by the registration of the mortgage is treated as a matter of evidence upon which the registrar can act in clearing the register of the incumbrance on the owner's title; forms (not under seal, except in case of a "release" of the land, or part of it, from the mortgage in Ireland) are prescribed, but the use of them does not appear to be obligatory.[7] In the English rules special provision is made for discharge of mortgages to building societies, &c., and also for combining a discharge of mortgage with a transfer of the land. Provision is also made in England and Ontario (and the same practice obtains in Ireland) for incumbrances entered on the register as existing at the time of the initial registration of the land being discharged in the same way as statutory mortgages.[8] Both in England and Ireland the instrument of discharge is in practice regarded as a receipt, and dutiable as a receipt only and not as a disposition of the land.[9]

In other jurisdictions the production of a formal memorandum, duly signed and attested, discharging the land in whole or in part, is usually essential for entry on the register of the fact of the mortgage having been discharged or satisfied. In New South Wales, Queensland, Tasmania, Papua, Fiji, and Federated Malay States,[10] the statutes enact that the memorandum must be "endorsed" on the mortgage. In Tasmania a "partial" discharge must be by separate instrument; this practice it is believed is followed in other jurisdictions.[11] The "endorsement" is of course intended to be

[5] *Douglas* v. *Mutual Life Ass. Co.* [1918] 1 W. W. R. 690, 693 (Al.).

[6] Eng. 1875, s. 28; 1903-8 Rules, rr. 166, 167, 182, 217; Own. & Inc. 204, 205; Br. & Sh. 116, 423, 424, 561. I. 1891, s. 42; 1910 O. 4, rr. 18, 19; Bro. & Gl. 65, 155, 245. On. 1914, s. 37; 1911 Rules, r. 30.

[7] Eng. f. 48. Own. & Inc. 432; I. ff. 16, 17. Bro. & Gl. 305; On. ff. 35-37.

[8] Eng. 1875, s. 19; 1903-8 Rules, rr. 216, 217; Own. & Inc. 205. On. 1914, s. 27. I. 1891, s. 42; Bro. & Gl. 245.

[9] Own. & Inc. 204, note 39; Br. & Sh. 516; 49 Sol. J. 544, 549 (10 June 1905); Bro. & Gl. 245, (a "release" of the land from the mortgage being on a different footing). The passages in Br. & Sh. (pp. 224, 424) to the contrary effect were written before the decision in *Firth* v. *Inland Revenue* [1904] 2 K. B. 205; but this case related to debenture stock of a company, and possibly may not apply to statutory mortgages of registered land.

[10] N. S. W. 1900, ss. 65, 67; Q. 1861, ss. 63, 64; Tas. 1862, ss. 59, 61, and 1886, s. 33; P. 1913, ss. 55, 56; Fi. 1876 (1906), ss. 72, 74; F. M. S. 1911, ss. 54, 56. See Aust. Torr. Syst. 965-967.

[11] This has certainly been so in New South Wales: Conv. Prec. 322, 323; MacDermott's Pract. of L. T. office, 48, 181.

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made on the duplicate copy in the possession of the mortgagee, execution of the mortgage in duplicate being prescribed in these jurisdictions (*ante,* p. 230). In the event of the mortgagee being out of the jurisdiction without leaving any person authorized to receive the mortgage debt, the amount due may be paid into the State or public treasury and the mortgage discharged on production of the official receipt at the registry. In New Zealand,[12] the memorandum of discharge may be "by endorsement on the mortgage or otherwise," and in the absence of the mortgagee the debt may be paid to the Public Trustee; it is also enacted that "a mortgage subject to a sub-mortgage" is not to be discharged "without the consent in writing of the sub-mortgagee." In Victoria, Manitoba, and Saskatchewan,[13] the provisions are as in New South Wales, &c., omitting the reference to endorsement—all that is required is the "production of a memorandum" duly executed and attested. Execution of the mortgage in duplicate is permitted but not peremptorily prescribed in Victoria (*ante,* p. 230). The Western Australian, Trinidad-Tobago, and Jamaica[14] statutes follow the Victorian, requiring merely a signed and attested memorandum, but contain a further enactment enabling a mortgage that has been entered on the register as existing at the time of initial registration to be discharged in the same manner as a registered statutory mortgage.

In South Australia[15] there are, much as in Victoria, &c., provisions for discharge on production of the mortgage instrument "together with a receipt or memorandum signed" and attested, and for discharge by payment to the State treasurer. The production of the mortgage appears to refer to the duplicate copy in the mortgagee's possession, but execution in duplicate is not peremptorily prescribed (*ante,* p. 230). There are also other enactments that do not appear elsewhere in the Australian statutes. A puisne incumbrancer is entitled (s. 131) to pay off the mortgagee and take a transfer of the latter's security. It is also expressly enacted that the "receipt or memorandum" may, when the mortgage is "held on a joint account," be signed "by one or more of the mortgagees" (s. 143). The registrar is also authorized, on proper evidence, to enter a discharge of the mortgage in the register, notwithstanding the absence of a formal instrument of discharge (s.

[12] N. Z. 1915, ss. 116, 117.

[13] V. 1915, ss. 163, 165; M. 1913, ss. 112, 125; Sas. 1917, ss. 118, 120, 121.

[14] W. A. 1893, ss. 123, 124, 126; Tr. 1902, ss. 80, 81, 85; J. 1888, ss. 96, 98, 109.

[15] S. A. 1886, ss. 131, 143, 144, 146-148.

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148). A "partial discharge," subsequent to an endorsed partial discharge, must be by "separate instrument" (s. 144).

The Leeward Islands statute [16] only makes it necessary for the mortgagee to "sign such an instrument as may correctly set forth the facts," and on this being "presented" the entry of the mortgage is "cancelled" on the register, or "altered," as required; a footnote to the section however refers to the schedule of forms, and this form is substantially to the same effect as the forms of discharge under other statutes. Execution of the mortgage in duplicate is not referred to.

The statutes in Alberta and North-West Territories [17] provide for the production of the instrument of mortgage "having endorsed thereon or attached thereto a receipt or acknowledgment" in prescribed form, and the discharge is registered as under the Australian statutes. The register may also be cleared of the mortgage upon production of a judge's order certifying that the amount due has been paid, and also (in Alberta) upon producing a separate instrument of discharge with proof of the loss or non-existence of the mortgage itself. In the absence of the mortgagee the moneys due may, on obtaining a judge's order, be paid into a bank and a discharge registered on production of the order and bank's receipt. The references to "endorsement" and "production" seem to contemplate that the mortgage has been executed in duplicate, but this (although apparently usual and convenient) is not prescribed by the statutes, and is not necessary.[18]

The instrument of discharge being a mere contract may be cancelled at any time before registration,[19] and until it is actually registered the powers of the mortgagee remain exercisable.[20] In order to be registrable, the discharge must be duly executed by the persons who appear on the register as mortgagees for the time being.[21] The only exception seems to occur in the case of South Australia, where it is expressly enacted that "one or more of a number of joint mortgagees" may sign the discharge (*ante,* p. 272). The registration of the discharge is however only necessary from the conveyancing point of view, that is, in order to vest the land in the owner freed from the incumbrance. The debt itself may be

[16] L. Is. 1886 (1914), s. 67; sch. B, f. 12.

[17] Al. 1906, ss. 63, 65; Can. 1906, ss. 100, 102, 103.

[18] *Toronto General Trusts Corp.* v. *Rex* (1917) 56 Can. S. C. R. 26, affd. by P. C. [1919] A. C. 679.

[19] *Mordaunt's Off. Assignee* v. *Gibson* (1914) 33 N. Z. R. 1423.

[20] *Taylor* v. *Wolfe* (1892) 18 V. L. R. 727.

[21] *Payne* v. *Rex* (1901) 26 V. L. R. 705, 753, 762; [1902] A. C. 552, 560.

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recovered by the persons entitled apart from registration, as for instance by the executors of a deceased mortgagee.[22] A good receipt for the debt may also be given by one of two or more joint creditors.[23] On the other hand, if the mortgagees are in fact trustees, registration of a duly executed discharge cannot be refused merely on that ground.[24]

If the debt has been paid off, and the owner cannot otherwise get a discharge registered, the mortgagee's interest is an interest in land within the meaning of the Trustee Acts, and can be made the subject of a vesting order accordingly.[25]

If the mortgagee refuses to execute a proper discharge, the owner can institute proceedings in the nature of a redemption action to compel him to do so.[26] This right of redemption is not a merely equitable right, as under the general law, but a legal right.[27] An order against the mortgagee to execute a discharge includes as part of the execution the delivery of the executed instrument to the person entitled.[28] Questions as to the proper form of the discharge may arise in such an action, just as in an ordinary redemption action. Thus, the mortgagee may contend that a beer covenant is to continue to be binding on the owner notwithstanding payment of the mortgage debt in full.[29] Independently of the form of the discharge, questions may also arise as to whether the discharge has put an end to all the mortgagee's rights and remedies against the land or against the owner personally, as for instance whether a beer covenant entered into by a separate deed continues in existence.[30] The question of the effect of a discharge duly registered upon the liability of the owner of the land under the covenants for payment is referred to *ante*, p. 240.

When the mortgage contains an acceleration clause, making the whole principal due on default in payment of interest, or of an instalment, &c., and the mortgagee exercises his power of sale or takes

[22] *Payne* v. *Rex* [1902] A. C. 552, 560.

[23] *Bell* v. *Rowe* (1901) 26 V. L. R. 511, 516, 517. In this case the discharge was signed by both joint mortgagees, and the question was whether a receipt for the debt by one only would have been good. The statement on p. 966 of Aust. Torr. Syst. should be corrected.

[24] *Ex p. Campbell* (1888) 9 Aust. L. T. 183.

[25] *In re Cain* (1893) 5 Q. L. J. 93.

[26] *Ross* v. *Victorian Perm. Build. Soc.* (1882) 8 V. L. R. 254; *McClure* v. *Marshall* (1884) 10 V. L. R. 1. Other illustrations: Aust. Torr. Syst. 966, note 51.

[27] *Douglas* v. *Mutual Life Ass. Co.* [1918] 1 W. W. R. 690, 693 (Al.).

[28] *McClure* v. *Marshall*, *supra*.

[29] *Staples* v. *Mackay* (1892) 11 N. Z. R. 258. With this case compare the circumstances in *Santley* v. *Wilde* [1899] 2 Ch. 474. Other cases under the general law are given in Aust. Torr. Syst. 967, note 57.

[30] *Macarthy* v. *Kelleher* (1897) 16 N. Z. R. 88. See preceding note.

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proceedings for foreclosure, it is ordinarily too late for the mortgagor to redeem or obtain a discharge except on terms of repaying the whole amount secured by the mortgage. It is however expressly provided in Manitoba [31] that relief may be given at any time before "sale or foreclosure." This means apparently before the execution of a binding contract of sale by the mortgagee,[32] or before final order of foreclosure;[33] in Saskatchewan the statute itself has the words "before sale or before the grant of a final order of foreclosure," and the enactment applies equally whether foreclosure proceedings are in the registry or by action in court.[34]

The six months' notice rule is not always in force.[35]

SECTION 3—MORTGAGES IN BRITISH COLUMBIA AND BRITISH HONDURAS.

BRITISH COLUMBIA.

The statutes in British Columbia seem to leave it open to mortgagees to employ any form of mortgage they choose, and incidental references to foreclosure and reconveyance [1] seem to imply that the use of mortgages in English form (that is, by conveyance and proviso for redemption) is at least contemplated and permissible. A company's debenture has been held registrable, though this would not be so in other jurisdictions.[2] A "charge" (which includes mortgage) may however be created otherwise than by an instrument under seal, and instruments tendered for registration may usually be in duplicate; but attestation by at least one witness is essential for instruments requiring registration, and the provisions prescribing methods of proof of execution are more elaborate than in any other jurisdiction.[3] On the whole, notwithstanding the absence of any prescribed form of statutory mortgage, and the absence of any enactment conferring express powers, rights or remedies on the mortgagee, a registered mortgage is much the same in its incidents and operation as in the other twenty jurisdictions. It

[31] M. 1913, s. 126.

[32] See *Saltman* v. *McColl* (1910) 12 West. R. 146. 14 *ib.* 91 (Man.), though there was no acceleration clause in question.

[33] *Wasson* v. *Harker* (1912) 22 West. R. 609 (Sas.), under the repealed s. 93 (10) of Sas. 1909 (now Sas. 1917, s. 118), which had "sale or foreclosure" only, as in Manitoba.

[34] Sas. 1917, s. 115; *Wasson* v. *Harker*, *supra*. *McGregor* v. *Hamstreet* (1912) 20 West. R. 642 (Sas.) is thus overruled; see Can. Torr. Syst. 348.

[35] Manitoba—Mortgage Act (R. S. 1913, c. 130), s. 13. See Aust. Torr. Syst. 942; Scott's Torr. Syst. Mort. 84.

[1] See B. C. 1911, ss. 53, 104 (3).

[2] *In re Land Registry Act* (1904) 10 B. C. R. 370. Contrast *Robison* v. *Coal Cliff Co.* (1891) 12 N. S. W. Eq. 293, 305.

[3] B. C. 1911, ss. 2, 51, 77-88, 107B.

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is, though an interest in the land, an interest by way of charge only,[4] as appears by reference to the principal sections relating to mortgages. The statutory permission to charge land by means of an instrument under hand only does not make the instrument operate as a deed apart from registration,[5] though when registered it would seem to have the same effect as if under seal.

The definition[6] of "charge," "mortgage," "mortgagee," and "mortgagor," shew that the statutes do not contemplate the registered ownership or "fee simple" of the land being vested in the mortgagee, but that a mortgage shall operate by way of charge only. "Charge" is defined as "any less estate than the fee simple," including "mortgage." "Mortgage" is defined as "any charge on land created for securing a debt or lien." "Mortgagee" is "the owner of a mortgage registered under this Act." "Mortgagor" is "the owner of land, or of an estate or interest in land, pledged as security for a debt."

The sections governing the formalities of registration[7] provide for official scrutiny and approval of instruments tendered for registration, particular methods of attestation and proof of execution, relation of time of registration back to time of tender, production of the certificate of title in the owner's possession. Other sections contain enactments providing for the deposit of the certificate of title at the registry during the currency of the mortgage, some examination of the title of the applicant for registration even when the title of the registered owner is not fully warranted, the necessity for registration of all instruments in order to vest any interest in the land, the effect of registration as notice and as conferring priority and a primâ facie title.[8] In particular, registration of a charge is notice of the charge and its contents to persons dealing with the land (s. 72). Mortgages by companies under the Companies Acts are by those Acts directed to be registered specially in addition to being registered at the land registry, but registration at the land registry will save the security from being "void" as unregistered.[9]

[4] The nature of the mortgagee's interest is discussed in *Re Mandeville* [1917] 1 W. W. R. 1522 (B. C.).

[5] *Dinsmore* v. *Philip* [1918] 1 W. W. R. 405 (B. C.).

[6] B. C. 1911, s. 2. [7] B. C. 1911, ss. 76-88, 170.

[8] B. C. 1911, ss. 20A, 29, 34-35A, 72, 73, 104-106, 169. As to examination of the title of the mortgagee applying for registration, see *In re Shaw* (1915) 32 West. R. 85. As to necessity for registration, see *Howard* v. *Miller* [1915] A. C. 318; s. 74 (there referred to) is now B. C. 1911, s. 104.

[9] Companies Act (R. S. 1911, c. 39), s. 102, as amended by 1916, c. 30, ss. 4, 5. *Dalton* v. *Dominion Trust Co.* [1918] 3 W. W. R. 42, seems to have been decided without regard to the amending Act, and is contrary to an Australian decision: see note 40 on p. 227 *ante*.

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The interest of the registered mortgagee is (exactly as in the Australian statutes) one of the exceptions to the warranty of title to the land conferred on the owner of the land by registration, and (where the owner of the land is registered with fully warranted title) a registered mortgagee is protected against any defect arising through fraud or error in a previous registration; the right to indemnity for loss is also framed on the Australian model, and so would include a mortgagee's interest in its scope.[10]

Mortgages may be discharged by their cancellation being marked on the register, and this cancellation releases the land from the charge and (when necessary) operates as a reconveyance.[11]

The mortgagee has the ordinary remedies of a mortgagee of unregistered land, though the power of sale and right of foreclosure are for the most part only incidentally referred to in the statutes.[12] Prior to the year 1917 a mortgagee did not lose his right to proceed on his personal remedy under a judgment against the mortgagor, merely because he became (through foreclosure) the registered owner of the land.[13] Now, his registration as owner with fully warranted (or "indefeasible") title extinguishes the mortgagee's right to recover under the covenants for payment, or even under a judgment or other collateral security[14]—thus going further than the legislation on this point in Victoria (*ante*, p. 240); but until his final registration as owner the mortgagee does not re-open the foreclosure merely by proceeding ineffectively under a judgment.

BRITISH HONDURAS.

No express provision for the creation or registration of mortgages is made in the British Honduras registration statute, and they are only referred to incidentally.[15] "Incumbrance" is defined as (inter alia) "any legal or equitable mortgage in fee or for any less estate." Provision is made in very general terms for registration of important "matters relating to registered land"; also for protection by caveat of "any unregistered estate or interest," and it is contemplated that a "mortgage" may be such an interest and so require protection by caveat.

[10] B. C. 1911, ss. 25A, 124, 126.

[11] B. C. 1911, ss. 148, 153, 156, 157.

[12] B. C. 1911, s. 104 (3).

[13] *Scottish Temperance Life Ass. Co.* v. *Vancouver Dist. Registrar* [1917] 3 W. W. R. 30. Contra in Australia: *Fink* v. *Robertson* (1907) 4 C. L. R. 864. But see *ante*, p. 240.

[14] B. C. 1911, s. 14A, amendment under 1917 Act.

[15] B. H. 1914, ss. 1, 36; sch. A, r. 9; sch. D, rr. 1, 12, 13.

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It seems clear that even a "mortgage in fee" would not vest the registered ownership of the land in the mortgagee, but would operate by way of charge only. The mortgagee would, apparently, have the same rights and remedies as a mortgagee in British Columbia. But in strict theory, unless the mortgage itself be entered on the register, the mere protection by caveat will constitute the mortgage an equitable security only, with such advantages as may be derived from the caveat under the doctrine of notice.

SECTION 4—EQUITABLE MORTGAGES.

SUB-SECTION 1—MORTGAGE BY DEPOSIT OF CERTIFICATE OF TITLE.

In this section, not only will the twenty jurisdictions dealt with in the preceding section be included, but also the remaining two—British Columbia and British Honduras—which were omitted by reason of their statutes making no provision for statutory mortgages. The present section will therefore be concerned with all twenty-two jurisdictions.

The subject of equitable interests in general has been dealt with in Chap. V, *ante*, pp. 153-155. It has been seen that equitable interests in registered land may be created, and that these will, as between the parties, be governed by the same principles as equitable interests in unregistered land.[1] The present sub-section is concerned with equitable mortgages over registered land constituted by the deposit (with or without a written document) of the owner's certificate of title with the creditor; these are recognized as valid securities in most jurisdictions.[2]

The general principle on which the recognition and effect of these equitable mortgages rest is that the owner's certificate of title —the document in his possession which is practically a transcript of entries on the register—is similar in value and legal effect to title deeds of unregistered land which is held by conveyance and possession. The important question is: How far does this similarity extend? Properly speaking, the certificate of title is not a muniment of title at all. The owner's title to his land rests ultimately on the register, which is kept in official custody at the registry.[3] The certificate

[1] Typical illustrations are: *Richards* v. *Jones* (1865) 1 S. A. R. 167; *Barry* v. *Heider* (1914) 19 C. L. R. 197; *Tietyens* v. *Cox* (1917) 17 S. R. (N. S. W.) 48. In the first-named case the analogy of copyholds was relied on.

[2] New Zealand is the one definite exception. On the other hand, these mortgages by deposit are expressly validated by statute in East Africa and Uganda (*ante*, p. 18).

[3] This is the principle of the decision in *Hall* v. *Commercial Bank* (1896, 22 V. L. R. 561), and is also illustrated by decisions on registered

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of title (in the sense here used) is however primâ facie evidence of the owner's title, and of the contents of the register, and is so far of the nature of a document of title that it must as a rule be produced whenever fresh entries have to be made on the register.[4] The limited extent of its munimentary character is shewn by the provisions made in the various statutes for registering transactions without its production, and for replacing it by another copy.

In some jurisdictions the statutes explicitly provide for equitable mortgage by deposit, in others any such provision is merely implied, and in others again the statutes are quite silent on the subject. In some jurisdictions the want of statutory enactment has been supplied by judicial decision.

In England these transactions are placed on a definite footing by statute and ancillary rules.[5] The owner is empowered to "create a lien on the land"—also referred to as a "mortgage by deposit"—and this "lien" is to be "equivalent to a lien created by the deposit of title deeds . . . by an owner entitled . . . for his own benefit." A similar lien may be created on a mortgage. The creditor or depositee may give written notice to the registrar, and this notice is to "operate as a caution." The insertion, in the above-quoted enactment, of the words "for his own benefit" makes it clear that the ordinary rule will not always apply, under which the person taking such a security gets no better title than the depositor himself had.[6] In no other jurisdiction is it made clear that the deposit is to have the effect of a deposit by a beneficial owner of his own title deeds.

In Ireland and Ontario[7] the deposit of the owner's certificate of title "for the purpose of creating a lien" is made equivalent merely to "a deposit of the title deeds of" land—or, in Ireland, of a "charge"—thus leaving open the question whether a depositee from a trustee could get priority over the cestui que trust. The

instruments executed in duplicate, such as: *Ivey* v. *Commrs. of Taxation* (1903) 3 S. R. (N. S. W.) 184, 189; *Toronto General Trusts Corp.* v. *Rex* [1917] 1 W. W. R. 823 (Al.), affd. 56 Can. S. C. R. 26, citing Aust. Torr. Syst. 761, and now affd. by P. C. [1919] A. C. 679.

[4] British Honduras is the only one of the twenty-two jurisdictions in which no provision is made for producing the owner's certificate of title or its equivalent at the registry upon registration of transactions with the land.

[5] Eng. 1897, ss. 6 (8), 8 (6); 1903-8 Rules, rr. 243, 251; Own. & Inc. 132-134, 205-207; Br. & Sh. 320. The depositeee's interest, though statutory and in that sense a legal interest, is still to be classed as equitable—as being defeasible, and the statement on this point in Own. & Inc. 207 should be corrected.

[6] See for instance *Perham* v. *Kempster* [1907] 1 Ch. 373, 380, a case of a trustee depositing deeds of the trust property as security for his own debt.

[7] I. 1891, s. 81 (5); Bro. & Gl. 62, 158, 187. On. 1914, s. 92.

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certificate of title must be a real document of title, and not a mere copy of the original when the latter is still in existence.[8]

To the same effect as the Irish and Ontario enactments are those of Queensland, South Australia, and Papua,[9] where "an equitable mortgage or lien" (in South Australia "an equitable mortgage") may be created by deposit of any "instrument of title," and this is to be equivalent to a "deposit of title deeds" of unregistered land. In Queensland and Papua the "equitable mortgagee may lodge a caveat," but this seems to be implied in South Australia. Under these enactments the equitable mortgagee is treated as entitled to the same remedy as under an ordinary deposit of title deeds, namely, foreclosure by means of a conveyance of the land by the debtor to the creditor.[10] The only other jurisdiction in which the statutes refer to "title deeds" is British Honduras, and there the certificate given to a transferee "may be dealt with and used as any title deeds, conveyances, or assurances may be dealt with and used;"[11] this seems to have the same meaning, and to be subject to the same ambiguity, as the enactments in the above-named five jurisdictions—Ireland, &c.

Fiji, Federated Malay States, and Leeward Islands[12] are the only other jurisdictions in which security by deposit of certificate of title is expressly authorized by the statutes. In Fiji, "an equitable mortgage or lien," in Federated Malay States "a lien," and in Leeward Islands "an equitable mortgage," may be created by the deposit, but no reference is made to any analogy of title deeds, and the rights and remedies of the depositee are stated in so many words. The equitable mortgageee may enter a caveat, and after obtaining judgment for the amount due may (in Fiji and Federated Malay States) have an order for sale of the land. In Leeward Islands priority is expressly made to depend on the date of entering the caveat, and after judgment the equitable mortgage is "converted into a mortgage" by a mortgage in the creditor's favour being actually registered; the creditor is thus placed in the position in which he would have been had he taken a statutory mortgage in the first instance. In Fiji and Federated Malay States it seems to be intended that the caveat—"to prevent all dealing with the land"—should not be allowed to remain indefinitely on the register, but that the equitable mortgagee should, after entering his caveat, at

[8] *National Bank* v. *Diffely* [1910] 1 I. R. 271, 275.

[9] Q. 1877, s. 30; S. A. 1886, s. 149; P. 1913, s. 58.

[10] *Conolly* v. *Noone* [1912] S. R. Q. 70.

[11] B. H. 1914, s. 31.

[12] Fi. 1876 (1906), s. 109; F. M. S. 1911, s. 80; L. Is. 1886 (1914), ss. 59-63. Innes F. M. S. 35.

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once proceed to enforce his rights.[13] The right to enforce the lien in these two jurisdictions also depends on the personal obligation being still in existence.[14]

In New South Wales, Tasmania, Victoria, Western Australia, Jamaica, Trinidad-Tobago, and Manitoba, the statutes make no express provision for security by deposit, but the validity of such a security is implied by the enactments which permit of registration under exceptional circumstances without production of the certificate of title; before this production can be dispensed with and registration effected, formal evidence must be furnished that the missing certificate of title has not been "deposited" by way of security, and the proposed registration must be advertised.[15] The validity of equitable mortgages by deposit of certificate of title in these jurisdictions has been amply established by judicial decision,[16] though the cases are not all consistent as to the degree of validity. The better opinion seems to be, on principle and the balance of authority, that the certificate of title, though not strictly a muniment of title, is yet such a document of title relating to the land that it is to be treated as an actual title deed for the purpose of implying an agreement to charge the land in favour of the depositee, the charge conferring the same remedies as a deposit of ordinary title deeds. There must be an actual deposit of the document into the possession and control of the creditor, or a written memorandum of charge—a mere order to another person to deliver the document to the creditor is not sufficient.[17]

In Saskatchewan, Alberta, and North-West Territories, no mention is made of security by deposit, and the enactments which (following Australian models) provide for registration without production of certificate of title omit all reference to the possibility of

[13] *Wilson* v. *Bank of New Zealand* (1891) Udal's Fiji R. 259, 263.

[14] *Alagappa Chetti* v. *Perianayagam* (1908) Innes F. M. S. 117.

[15] N. S. W. 1900, s. 38 (3); Tas. 1862, s. 93; V. 1915, s. 78; W. A. 1893, s. 74; J. 1888, s. 122; Tr. 1902, s. 126; M. 1913, s. 60. These enactments were relied on in *In re Nathan* (1863) 1 S. A. R. 166 (repealed South Australian section); *London Chartered Bank* v. *Hayes* (1871) 2 V. R. 104; *Alexander* v. *Simpson* (1903) Jamaica, unreported. And see Aust. Torr. Syst. 786-788.

[16] See preceding note. Other cases are: *Patchell* v. *Maunsell* (1881) 7 V. L. R. 6; *Plumpton* v. *Plumpton* (1886) 11 V. L. R. 733; *Re Elliott* (1886) 7 N. S. W. 271; *Robison* v. *Coal Cliff Co.* (1891) 12 N. S. W. Eq. 293, 306; *Hall* v. *Commercial Bank* (1896) 22 V. L. R. 561; *Tolley & Co.* v. *Byrne* (1902) 28 V. L. R. 95; *Charters* v. *Cosmopolitan Land Banking Co.*, *ib.* 251; *Lascelles* v. *Benlisa* (1912) 2 Tr. & Tob. 181, citing Aust. Torr. Syst. 787.

[17] *Colonial Bank* v. *Riddell* (1893) 19 V. L. R. 280; *Hall* v. *Commercial Bank* (1896) 22 V. L. R. 561.

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a missing certificate of title having been deposited as security for money.[18] It has however been held that these statutes are to be construed like the Australian statutes on this point, and equitable mortgages by deposit of certificate of title or other instrument of title have been held valid as in Victoria, New South Wales, &c.[19]

British Columbia differs from all other jurisdictions. Equitable mortgages merely by deposit of title deeds or certificate of title seem to be recognized as in other jurisdictions.[20] No "instrument" until registered is effectual to "pass any estate or interest either at law or in equity," and an equitable mortgage by "deposit of title deeds and memorandum thereof" may not be registered.[21] But the interest created by a deposit of certificate of title without writing would seem to be untouched by these enactments,[22] and could presumably be protected by caveat as in other jurisdictions, though only "by leave of the registrar,[23] and the depositee would at least be able to delay registration of adverse interests, even if his equitable mortgage by deposit were not of the same juridical validity as elsewhere.

The last jurisdiction to be referred to is New Zealand. There the equitable rule, by which security can be given over land by a mere deposit of documents of title, has been definitely abrogated as part of the local law, and this abrogation appears to extend to registered land. It is enacted by a general statute that land is not to be "charged or affected, by way of equitable mortgage or otherwise, by reason only of any deposit of title deeds," with or without a written memorandum, and this statute is "not to conflict with" the registration statutes.[24] The enactment in the registration statute itself, relating to registration without production of certificate of title in case of loss, &c., does not contain the reference (found in the Australian statutes) to the possibility of the missing certificate of title being "deposited" as security.[25] In New Zealand,

[18] Sas. 1917, s. 69; Al. 1906, s. 123; Can. 1906, s. 164.

[19] *Fialowski* v. *Fialowski* (1911) 19 West. R. 644 (Al.); *Acme Co.* v. *Huxley* (1912) 20 West. R. 133 (Al.). These cases are stated in Can. Torr. Syst. 275-278.

[20] An illustration is *Hudson's Bay Co.* v. *Kearns* (1896) 3 B. C. R. 330, 4 B. C. R. 536.

[21] B. C. 1911, ss. 33, 104; *Howard* v. *Miller* [1915] A. C. 318, 326.

[22] The principle is that when a statute refers to interests in land created by an "instrument," interests not created by any instrument are excluded: *White* v. *Neaylon* (1886) 11 A. C. 171; *National Bank* v. *Diffely* [1910] 1 I. R. 271.

[23] B. C. 1911, s. 62.

[24] Property Law Act 1908 (No. 152), ss. 1 (4), 63; N. Z. 1915, s. 1 (2); Martin's Prop. Law Act 1905 (N. Z.) 109. A case under the general enactment is *Beckett* v. *District Land Registrar* (1909) 28 N. Z. R. 788.

[25] N. Z. 1915, s. 40.

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then, it would seem that no equitable mortgage could, properly speaking, be created by deposit of certificate of title, and the depositee's interest, not being an actual interest in the land, would perhaps not be susceptible of protection by caveat;[26] but the depositee would seem to have the right to hold the certificate of title, by virtue of agreement to that effect, and thus delay the registration of adverse rights.

The law as to the nature of the interest conferred by the deposit, and as to the rights and remedies of the depositee, is thus fairly uniform in the twenty-two jurisdictions; exceptions to this uniformity occur principally in the cases of England, Leeward Islands, British Columbia, and New Zealand, as stated above. The documents that may by their deposit create a security over the land include, not only certificates of title (land certificates, &c.), but also registrable instruments not yet registered, such as transfers, mortgages, &c.[27]

The principal feature of these securities by deposit is that they are purely equitable and, though authorized (expressly or impliedly) by the statutes, are not registrable so as to become legal interests, and therefore have no warranty of title accorded to them. Like other equitable and unregistrable interests, they can (except perhaps in New Zealand) be protected by caveat, and their priorities inter se and in relation to registered interests will be governed by the same considerations as govern other equitable interests in registered land.

Except in New Zealand, these securities are to be classed as actual interests in the land. They therefore (though unregistered and with no warranty of title) carry with them the right to compensation or indemnity if lost (wholly or in part) to their owner through wrongful registration of another interest which is made indefeasible by the statutes.[28]

Though in England these securities are equitable, as in other jurisdictions, there is one important distinction between the English and other statutes, and this distinction serves to emphasize the purely equitable nature in other jurisdictions of the interest of the depositee. In England (*ante*, p. 279) the deposit has the same effect as a deposit of title deeds of unregistered land by an owner entitled for his own benefit. Thus, if the registered owner were in fact a trustee, the depositee's title would not necessarily be affected

[26] This view receives support from a Malay case: *Sokalingam Chetti* v. *Mohamed Maidin* (1912) Innes F. M. S. 197.

[27] *Plumpton* v. *Plumpton* (1885) 11 V. L. R. 733; *Acme Co.* v. *Huxley* (1912) 20 West. R. 133 (Al.); *Barry* v. *Heider* (1914) 19 C. L. R. 197.

[28] *Tolley & Co.* v. *Byrne* (1902) 28 V. L. R. 95.

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by that circumstance, and he might be entitled in priority to the cestui que trust. In other jurisdictions it is difficult to say confidently whether the priorities in such a case would be the same as in England. The better opinion seems to be that the priorities would not be the same, and that the de facto trustee would confer no better title on the depositee than he himself had as against his cestui que trust. One case which conflicts with this view seems to rest on insufficient grounds.[29] It was held that the depositee of a certificate of title from a person who had become registered owner by means of a forged transfer was entitled in priority to the rightful owner whose name had been forged; the case of *Tolley & Co.* v. *Byrne*[30] was relied on. That case however had nothing to do with competing claims to priority, but only with compensation for loss.

Though the general rule is that the depositee need not (except in Leeward Islands) enter a caveat or do anything actively to protect his equitable mortgage as against other equities,[31] his rights have sometimes been postponed to an interest later in date.[32] On the other hand, superior diligence in entering a caveat has sometimes given the depositee priority over an unprotected interest of earlier date.[33] The depositee's rights may of course be lost by the registration of an adverse interest.[34]

In most jurisdictions the proper remedy of the equitable mortgagee by deposit of certificate of title appears to be foreclosure, effected by an order of the court for the land to be transferred by the debtor to the creditor free from any right of redemption;[35] if a proper transfer cannot be had, a vesting order may be made.[36] In Fiji and Federated Malay States sale is expressly made the remedy, and in Leeward Islands the security is "converted" into a legal statutory mortgage (*ante,* p. 280). It has indeed been held in one case that the equitable mortgagee is only entitled to judgment

[29] *Fialowski* v. *Fialowski* (1911) 19 West. R. 644 (Al.), stated in Can. Torr. Syst. 275.

[30] (1902) 28 V. L. R. 95, cited above.

[31] *Re Elliott* (1886) 7 N. S. W. 271; *Tolley & Co.* v. *Byrne, supra; Wilson* v. *Bank of New Zealand* (1891) Udal's Fiji R. 259, 263.

[32] *Patchell* v. *Maunsell* (1881) 7 V. L. R. 6. This case was not cited in *Re Elliott, supra.* And see *Robison* v. *Coal Cliff Co.* (1891) 12 N. S. W. Eq. 293, 306.

[33] *Conolly* v. *Noone* [1912] S. R. Q. 70.

[34] *Patchell* v. *Maunsell, supra; Tolley & Co.* v. *Byrne, supra.*

[35] *Hall* v. *Commercial Bank* (1896) 22 V. L. R. 561; *Charters* v. *Cosmopolitan Land Banking Co.* (1902) 28 V. L. R. 251; *Conolly* v. *Noone, supra.*

[36] *British and Australasian Co.* v. *South Queensland Pastorate Co.* (1894) 6 Q. L. J. 83; *Wilson* v. *Brown* (1896) 7 Q. L. J. 16. *Ante,* p. 257.

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as in a personal action for principal and interest, and not to a declaration of his rights as mortgagee,[37] but this is quite opposed to the current of decisions.

The statutory method of foreclosure (as in New South Wales, &c.) has no application to an equitable mortgage by deposit of certificate of title.[38]

There seems to be no reason why an equitable mortgagee by deposit should not have the ordinary remedies of an equitable mortgagee under the general law; for instance, he would probably be entitled to have a receiver appointed.[39]

SUB-SECTION 2—OTHER EQUITABLE MORTGAGES.

Equitable mortgages by deposit of certificate of title have a certain degree of recognition in all jurisdictions, except New Zealand (*ante,* p. 282), and are specially authorized by statute in some. Other equitable mortgages have no special recognition accorded them, but stand on the same level as other equitable interests which (being unregistered) require protection by caveat (*ante,* p. 172). In three jurisdictions—British Columbia, Leeward Islands, and Federated Malay States—an equitable mortgage stands on a lower juridical level than elsewhere, being a contractual right rather than an actual charge on the land.

An equitable mortgage is one that falls short of being a complete legal security such as is effected by the registration of a mortgage in due form. The essential feature of an equitable mortgage of registered land is that, being unregistered, it is liable to be displaced by another interest, but it may be in any form which sufficiently indicates the intention to charge the land and make it security for money.

In some jurisdictions, owing to the possibility of registration without the title to the land being fully warranted, particularly where "off register" transactions are expressly permitted, the technical legal estate as it exists apart from registration has still to be taken into account; here there may be a distinction between a mortgage in the form of an English legal mortgage, and one purporting to be by way of charge only.[1] The jurisdictions referred to are:

[37] *Lascelles* v. *Benlisa* (1912) 7 Tr. & Tob. 181. *Ante*, p. 178.

[38] *Charters* v. *Cosmopolitan Land Banking Co., supra; Tietyens* v. *Cox* (1917) 17 S. R. (N. S. W.) 48, 55.

[39] See *Union Bank of Canada* v. *Eugen* [1917] 2 W. W. R. 395 (Sas.).

[1] *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631, 657. See Own. & Inc. 143 *et seq.*, 233.

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England, Ireland, Ontario—"off register" transactions being expressly permitted in these three—British Columbia, and Leeward Islands. In the majority the old technical legal estate is in practice merged in the registered ownership, so that any conveyance of it would operate by way of contract only, or at most as the conveyance of an equitable interest or right.[2] But in any case no conveyance of any technical legal estate would affect the registered ownership as such; in most jurisdictions a mortgage in English form would not be accepted for registration at all,[3] and if registered would take effect as a charge only and not as an assurance of the registered ownership.

There is some difference with respect to the juridical value of an equitable mortgage in British Columbia, Leeward Islands, and Federated Malay States, as compared with other jurisdictions, though this difference will not often issue in any practical result, and it will be sufficient to state it here once for all. In each of these jurisdictions there is a special enactment[4] which in terms goes further towards making unregistered instruments ineffectual to create actual interests in the land than do the more general enactments, under which no interest passes until registration but which have been construed in such a way as not to prevent an equitable interest passing. Under these special enactments, an instrument which would elsewhere be a valid equitable mortgage would merely confer contractual rights—among these a right to specific performance. Only under special circumstances—illustrated by the cases cited in the footnote—would the difference between such a contractual right, and an actual equitable interest, become apparent for practical purposes. The difference however does exist, and must be borne in mind.

Equitable mortgages have been constituted by an ordinary unregistered deed, such as would be used in connexion with unregis-

[2] *McEllister* v. *Biggs* (1883) 8 A. C. 314; *Allison* v. *Petty* (1899) 9 Q. L. J. 125; *Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75; *Macindoe* v. *Wehrle* (1913) 13 S. R. (N. S. W.) 500; *Davis* v. *McConochie* (1915) 15 S. R. (N. S. W.) 510; *Brown* v. *Abbott* (1908) 5 C. L. R. 487.

[3] Special provision is made for registering informal instruments under exceptional circumstances in South Australia, Papua, and Manitoba: S. A. 1886, s. 247; P. 1913, s. 126B; M. 1913, s. 91. A mortgage was rejected in: *Re Spokane* (1910) 15 West. R. 637 (Al.); *Re North-West Telephone Co.* (1909) 12 West. R. 300 (Sas.). A lease was rejected in *Crowley* v. *Templeton* (1914) 17 C. L. R. 457, and see *Shore* v. *Green* (1890) 6 Man. R. 322.

[4] B. C. 1911, ss. 33, 104; *Howard* v. *Miller* [1915] A. C. 318, 326. L. Is. 1886 (1914), s. 6 (2); *In re Smith* [1916] 2 Ch. 206. F. M. S. 1911, s. 5; *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491, 500; *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A. C. 209.

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tered land,[5] by instruments purporting to effect a charge other than by way of mortgage, in statutory form or otherwise,[6] by informal documents of lien,[7] by mere agreement to give a mortgage,[8] by mortgage in statutory form but unregistrable by reason of some mistake or informality,[9] by absolute transfer in statutory form held unregistered.[10]

In all these cases the interest of the equitable mortgagee was susceptible of protection by caveat.[11] To be allowed such protection the interest must be conferred by an instrument which the person executing it has a right to execute; a caveat will give no additional validity to an instrument which cannot legally be executed.[12] In some jurisdictions — Manitoba, Saskatchewan, Alberta — certain transactions are made void as security on land, and these cannot be protected by caveat.[13]

Since equitable mortgages by deposit of certificate of title are held valid even in jurisdictions whose statutes do not expresssly sanction them, there seems no reason on principle why the interest under any other equitable mortgage should not be considered to be of the same nature, carrying with it the same rights and remedies.[14] If the two kinds of equitable mortgage are on the same footing, any equitable mortgagee suffering loss through wrongful registration of another person might under some circumstances be entitled to

[5] *Butler* v. *Fairclough* (1917) 23 C. L. R. 78; *In re Smith* [1916] 2 Ch. 206 (L. Is.); *Macdonald (John) & Co.* v. *Tew* (1914) 32 O. L. R. 262; *Keogh* v. *Registrar-General* (1918) 24 C. L. R. 413.

[6] *Imperial Elevator Co.* v. *Olive* (1914) 29 West. R. 339 (Sas.); *Coast Lumber Co.* v. *McLeod*, *ib.* 357; *Drewry* v. *Cowie* [1919] 2 W. W. R. 388 (Sas.).

[7] *Smith* v. *American Abell Engine Co.* (1907) 6 West. R. 179 (Man.); *Sawyer and Massey Co.* v. *Waddell* (1904) 6 Terr. R. 45.

[8] *Yockney* v. *Thompson* (1913) 50 Can. S. C. R. 1; *In re Registration of Caveat* (1908) Innes F. M. S. 114.

[9] *Rogers Lumber Co.* v. *Smith* (1913) 23 West. R. 946 (Sas.); *Sheath* v. *Hume* (1903) 23 N. Z. R. 221.

[10] *Grace* v. *Kuebler* [1917] 1 W. W. R. 1213 (Al.), affd. 56 Can. S. C. R. 1.

[11] See Aust. Torr. Syst. 1036, for other cases of mortgage interests protected by caveat; the observations there made have been approved in more than one of the Canadian cases above cited.

[12] *Re Gaar Scott Co.* (1909) 12 West. R. 245 (Sas.); *Re International Harvester Co.* or *Re Ebbing* (1909) 11 West. R. 29 (Sas.). These and some other cases are explained or overruled in *Imperial Elevator Co.* v. *Olive* (1914) 29 West. R. 339 (Sas.).

[13] Manitoba—Lien Notes Act (R. S. 1913, c. 115), s. 4. Alberta—Charges on Land Act, 1910 (2nd Sess.) c. 5. Saskatchewan—Sas. 1917, ss. 99, 129, 130; *Gilbert* v. *Ullerich* (1911) 17 West. R. 157. See Can. Torr. Syst. 370.

[14] See particularly *Yockney* v. *Thompson* (1913) 50 Can. S. C. R. 1, affg. 22 West. R. 863, 25 *ib.* 602 (Man.); *Imperial Elevator Co.* v. *Olive* (1914) 29 West. R. 339 (Sas.).

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indemnity as in the case of a mortgagee by deposit (*ante*, p. 283) in those jurisdictions in which provision is made for payment of indemnity.

The remedies of an equitable mortgagee (otherwise than by deposit) are the subject of judicial decision chiefly in the Canadian courts, but these decisions appear to be applicable in other jurisdictions. An unregistered or equitable mortgagee must go to the court in order to enforce his security,[15] and though apparently sale as well as foreclosure may be had at the option of the mortgagee,[16] foreclosure by order of the court for transfer of the land would seem the appropriate remedy, as on a mortgage by deposit (*ante*, p. 284). An equitable mortgagee can have a receiver appointed,[17] and in general the remedies of an equitable mortgagee of unregistered land are open to equitable mortgagees of registered land.[18]

The subject of priorities of equitable interests, inter se and in relation to registered interests, is referred to under "equitable interests" *ante*, pp. 171, 172, and "equitable mortgages by deposit" *ante*, p. 284. The absence of any right given by possession of the owner's certificate of title must often affect questions of priority. Such questions, as regards the equitable mortgages now under consideration, usually depend on the effect of entering a caveat. This part of the subject is also referred to under "Protection by restrictive entry," *ante*, p. 189.

Although it is not the caveat, but the instrument of equitable mortgage itself, that constitutes the interest or enforceable right of the mortgagee, yet the removal of the caveat from the register—even in order to substitute another security, or in consequence of some mistake in the registry as to the effect of such removal—may at once deprive the equitable mortgage of any priority already gained as against a competing interest.[19] And the removal of the caveat may have this effect, in the absence of fraud, even if the owner of the competing interest already had notice of the equitable mortgage, or the latter would be entitled to priority independently of the caveat.[20]

When the equitable mortgage is prior in date of execution to the competing interest, and a caveat has been entered before registration of the competing interest, the equitable mortgage will usu-

[15] *Sheath* v. *Hume* (1903) 23 N. Z. R. 221.

[16] *Imperial Elevator Co.* v. *Olive*, and *Sheath* v. *Hume*, *supra*.

[17] *Union Bank of Canada* v. *Eugen* [1917] 2 W. W. R. 395 (Sas.).

[18] *Tietyens* v. *Cox* (1917) 17 S. R. (N. S. W.) 48, 55; *Keogh* v. *Registrar-General* (1918) 24 C. L. R. 413 (power of sale in unregistered instrument).

[19] *Rogers Lumber Co.* v. *Smith* (1913) 23 West. R. 946 (Sas.); *Butler* v. *Fairclough* (1917) 23 C. L. R. 78.

[20] *Union Bank of Canada* v. *Boulter Waugh Lim.* (1919) 58 Can. S. C. R. 385.

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ally secure priority.[21] But the equitable mortgagee may be postponed to a purchaser, when the contract of sale was prior in date to the equitable mortgage, and notwithstanding the protection of the equitable mortgage by a caveat which was not brought to the notice of the purchaser.[22]

A mortgage is usually protected by caveat only when it cannot for some reason be registered. But there seems to be no substantial doubt that even a registrable mortgage may, if the mortgagee so desire, be the subject of a valid caveat.[23]

SECTION 5—SECURITIES OTHER THAN MORTGAGES.

SUB-SECTION 1—NON-STATUTORY SECURITIES.

This sub-section includes in its scope all twenty-two jurisdictions—that is, British Columbia and British Honduras as well as others. The non-statutory securities to be here treated of are those that are created by vesting the whole ownership of the debtor's land in the creditor, the right of the debtor to have the land re-assured to him being the subject of a separate agreement. The creditor becomes the registered owner of the land, and the defeasance agreement is left unregistered. A transaction of this kind is not, having regard to the difference between ordinary conveyancing law and the system set up by registration of title, properly a mortgage,[1] though often loosely referred to as such.[2] In the absence of express prohibition in the statutes, registration of a transfer made merely by way of security could hardly be refused, though such refusal is said to have occurred in Queensland.[3] Systems of regis-

[21] *Yockney* v. *Thompson*, and *Imperial Elevator Co.* v. *Olive*, *supra*; *Coast Lumber Co.* v. *McLeod* (1914) 29 West. R. 357 (Sas.), the Australian case of *In re Scanlan* (1887, 3 Q. L. J. 43) being relied on.

[22] *Grace* v. *Kuebler* (1917) 56 Can. S. C. R. 1.

[23] *Union Supply Co.'s Case* [1918] 2 W. W. R. 305 (Sas.).

[1] *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A. C. 209; *Rutherford* v. *Mitchell* (1904) 15 Man. R. 390. In England the Somerset House officials refuse to treat a transfer of land made to a creditor by way of security only as a mortgage for purposes of stamp duty; this should be added to the observations at p. 190 of Own. & Inc.

[2] *Haji Abdul Rahman* v. *Mohamed Hassan*, *supra*, at p. 213 quoting from the judgments below; *Delancy* v. *Sandhurst Build. Soc.* (1878) 5 V. L. R. 189, 194; Aust. Torr. Syst. 796, 943, 972, and Victorian cases there cited; Guest's Transfer of Land Act 291; Duffy & Eagl. Transfer of Land Act, 404; Own. & Inc. 190; *Wallace* v. *Smart* (1912) 19 West. R. 787 (Man.); Can. Torr. Syst. 278-280, and cases there cited; *Keogh* v. *Registrar-General* (1918) 24 C. L. R. 413.

[3] Power's Real Prop. Acts, 66. The judicial observations there quoted seem not to have been reproduced in any report of the case referred to.

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tration under which mortgages can only be effected by means of transfer are on a different footing altogether.[4]

The view that such securities are to be treated as technical mortgages is supported in Australasian jurisdictions by the practice in Victoria—and litigation arising thereon—of taking security over land in favour of building societies by means of an absolute transfer with unregistered defeasance agreement. In other jurisdictions—particularly the Canadian—this view receives support from the circumstance that in many cases it has been necessary merely to decide the bare fact that an absolute transfer has been made by way of security only, and nothing turned on any distinction between mortgages of unregistered land and mortgages of registered land. Whenever the rights of an actual mortgagee or mortgagor are claimed and have to be decided, the differences between a true mortgage and a transfer by way of security become apparent. It may be that with reference to unregistered land and the general law of mortgage, "every transaction that resolves itself into a security is a mortgage";[5] but this is hardly a correct statement when applied (as is sometimes done) to transfers of registered land by way of security. Systems of registration of title contemplate that mortgages shall only be created by means of a charge on the land, duly registered, and not by a conveyance of the ownership.[6] The position of a transferee, or of a mortgagee after he has foreclosed and had the ownership of the land vested in him, may be quite different to that of a mortgagee of unregistered land who gets a conveyance of the legal estate.[7]

Whether the agreement on the part of the registered owner of the land to re-transfer to the former owner on payment of the debt be contained in a formal instrument of defeasance, or be merely an informal understanding, seems to make no difference in the juridical nature of the parties' rights. The reported cases shew instances of each kind of defeasance agreement.[8] Nor does it seem material

[4] See Aust. Torr. Syst. 798, as to "conditional purchases" in New South Wales. The position of a mortgagee (by absolute transfer) under the Crown Lands Acts of New South Wales is further illustrated by the case of *Minister for Lands* v. *Jeremias* (1917) 23 C. L. R. 322.

[5] The quotation is from *Blunt* v. *Marsh* (1888) 1 Terr. R. 126. The land in this case was apparently registered land, though the report does not expressly say so.

[6] *Rutherford* v. *Mitchell* (1904) 15 Man. R. 390; *Haji Abdul Rahman* v. *Mahamed Hassan* [1917] A. C. 209.

[7] *Fink* v. *Robertson* (1907) 4 C. L. R. 864; *Colonial Invest. Co.* v. *King* (1902) 5 Terr. R. 371; *Douglas* v. *Mutual Life Ass. Co.* [1918] 1 W. W. R. 690 (Alb.)—but see *Mutual Life Ass. Co.* v. *Douglas* (1918) 57 Can. S. C. R. 243.

[8] There was no formal instrument in the following cases: *Wallace* v. *Smart* (1912) 19 West. R. 787 (Man.); *Robinson* v. *McCauley* (1913) 26

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that the initial registration of the land has only taken place after the assurance to the creditor has been made, the creditor thus becoming registered owner otherwise than by a transfer from a registered owner.[9] The entry of a caveat by the debtor to protect his rights might have important practical results, but would not alter the essential nature of the transaction.[10]

In some circumstances the rights of the parties to the defeasance agreement can be decided without its being necessary to define exactly the nature of the right to receive a re-transfer of the land, that is, whether it be an interest in the land or merely a contractual right.[11] Taking the view that the Malay case of *Haji Abdul Rahman* v. *Mohamed Hassan* [12] applies in other jurisdictions, the actual decisions in the cases just cited will not be affected by the Privy Council judgment, though this judgment by implication overrules the dicta contained in some of these cases to the effect that the right to a re-transfer is an actual interest in the land.

In some circumstances, again, the question of interest in land or contractual right is vital to the decision of the case, and where the right to a re-transfer has been held to be an actual interest in the land, such decisions must be taken to have been overruled (on the view above suggested) by the Privy Council judgment in the Malay case.[13]

West. R. 285 (Man.); *Vance* v. *Macfarland* (1883) 1 Q. L. J. 134, 243; *Keogh* v. *Registrar-General* (1918) 24 C. L. R. 413. Other cases in Can. Torr. Syst. 278.

[9] This happened in *Vance* v. *Macfarland*, *supra*.

[10] *Sander* v. *Twigg* (1887, 13 V. L. R. 765) seems to be the only case in which the entry of a caveat is referred to.

[11] Illustrations are: *Vance* v. *Macfarland*, *supra*; *Blunt* v. *Marsh* (1888) 1 Terr. R. 126; *McCue* v. *Smith* (1911) 17 West. R. 145 (Al.); *McMillan* v. *Gunn* (1906) 5 West. R. 479 (Man.). In *Sander* v. *Twigg* (*supra*) and *Watson* v. *Royal Perm. Build. Soc.* (1888, 14 V. L. R. 283) the decisions would apparently have been the same had the right to a re-transfer been held to be a purely contractual right. *Sander* v. *Twigg* is stated in Aust. Torr. Syst. 796. See an article in Jurid. Rev. xxix. 162 (1917)—"Registration of Title and Contractual Rights."

[12] [1917] A. C. 209. The whole ratio of the judgment delivered by Lord Dunedin is based on the registration statute itself—"a system of registration of title modelled on the well-known Torrens system of Australia"—and not on any relevant peculiarities of local law. It is necessary to point out that Malay law does differ from that of other jurisdictions in two respects: the common law is not in force as the foundation of local jurisprudence, and the enactment (F. M. S. 1911, s. 5) expressly prohibiting non-statutory methods of transfer and mortgage is not contained in the majority of other statutes. This enactment, however, only operates to make a transaction ineffective to confer any interest in the land, and leaves it valid as a contract: *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491; *Haji Abdul Rahman* v. *Mohamed Hassan*, *supra*.

[13] Illustrations are: *Delaney* v. *Sandhurst Build. Soc.* (1879) 5 V. L. R. 189; *Richmond Local Board* v. *Victorian Perm. Build. Soc.* (1890) 16 V. L. R. 845; *Wallace* v. *Smart* (1912) 19 West. R. 787 (Man.); *Short* v. *Graham* (1908) 7 West. R. 787 (Al.).

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On the other hand, the Privy Council's decision has been anticipated in some cases, and the right of the former owner under the defeasance agreement held to be a merely contractual right (or at most a possessory right), and not an interest in the nature of ownership of the land at all.[14]

The rights and liabilities of the parties to a security by transfer and defeasance resemble those of mortgagor and mortgagee in some respects and differ from them in others. The general principle would seem to be that the defeasance agreement must be taken to mean what it says, and that when the agreement is silent upon any point it is not necessarily to be presumed that the ordinary English law of mortgage applies. The parties are at liberty to make any stipulations they please—not being prohibited by law—and these will govern their relations. Questions of difficulty must arise when these relations are not governed by express stipulations. Typical questions of this sort would be: whether the creditor had a power of sale; whether he must complete his title by foreclosure; what is the limit of time within which the debtor is entitled to recover the land. In some respects this kind of security resembles a sale with agreement for re-purchase.[15]

The transaction so far resembles a mortgage that the debtor is entitled to receive a transfer of the land on paying the creditor his debt. This broad proposition is illustrated by cases where the debtor has been held so entitled as against successors in title of the creditor. Thus, where the creditor (the registered owner) has transferred to a person who is not authorized by the debtor to receive any such transfer, the debtor can claim to have the land transferred to himself.[16] The debtor would also seem to be entitled to assign his interest or right to a transfer, by way of sale or otherwise.[17] The creditor has sometimes been treated as a mortgagee for the purposes of local Health Acts, Stamp Acts, and proceedings to recover the land from the debtor.[18]

[14] *Port Melbourne (Mayor)* v. *Permanent Savings Build Soc.* (1894) 20 V. L. R. 508; *Rutherford* v. *Mitchell* (1904) 15 Man. R. 390; *Robinson* v. *McCauley* (1913) 26 West. R. 285 (Man.).

[15] A close analogy is afforded in the mortgage by conditional sale, as it formerly existed in India, and may exist even now in Mohamedan communities outside India: see *Balkishcen Das* v. *Legge* (1899) L. R. 27 I. A. 58; Mitra Law of Limitations in India (5th ed. 1911) 1193; Jour. Comp. Leg. xvii. 205 (1917)—"Malay Mortgage by Conditional Sale."

[16] *Vance* v. *Macfarland*, *Sander* v. *Twigg*, *Watson* v. *Royal Perm. Build. Soc.*, *supra*.

[17] *Sander* v. *Twigg*, *Watson* v. *Royal Perm. Build. Soc.*, *supra*. In the former case the debtor's interest was referred to as an "equity of redemption," in the latter as a "quasi-equity of redemption."

[18] *Richmond Local Board* v. *Victorian Perm. Build. Soc.* (1890) 16 V. L. R. 845; *Ex p. Ballarat Land Co.* (1895) 17 Aust. L. T. 43, 113; *Delaney* v. *Sandhurst Build. Soc.* (1879) 4 V. L. R. L. 273, 5 *ib.* 189.

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In each of the six Victorian cases above cited the creditors and registered owners of the land were a building society or the trustees of a building society, and the defeasance agreement consisted of a formal deed with elaborate provisions as between ordinary mortgagor and mortgagee.[19] In the Queensland case of *Vance* v. *Macfarland* there was no formal defeasance agreement, but a wife had transferred her land to the creditor as security for her husband's debt.

In many respects these securities differ from mortgages, and these differences have been recognized when the interest of the debtor has been called a "quasi-equity of redemption." Thus, a writ of execution under a judgment against the debtor either cannot be registered at all against the land, since there is no land standing in the debtor's name against which to register it;[20] or if (as in some jurisdictions) registration against specific land is not required, the registration of a judgment or execution has (according to the better opinion) no effect on the land, the debtor having parted with all his registered ownership.[21] Under local Health Acts the creditor has sometimes been held to be the owner of the land and not a mere mortgagee.[22]

With regard to the various periods allowed by limitation Acts for the parties to enforce their rights, the position of the creditor who is the registered owner of the land is in some respects superior to that of a mortgagee. The transfer of the land to the creditor has been held to be equivalent to giving him possession, and time runs against the debtor from the date of the transfer accordingly.[23] Moreover, the period applicable, where there is any difference, is the period assigned by the limitation Act to actions for recovery of land generally, and not the period assigned to actions for redemp-

[19] It may be assumed that the deed of defeasance was substantially in one of the forms given in Guest's Transfer of Land Act, 291, and Duffy & Eagl. Transfer of Land Act, 404.

[20] *Watson* v. *Royal Perm. Build. Soc.* (1888) 14 V. L. R. 283, deciding the point left open in *Sander* v. *Twigg* (1887) 13 V. L. R. 765.

[21] *Robinson* v. *McCauley* (1913) 26 West. R. 285 (Man.), a decision on appeal. *Wallace* v. *Smart* (1912) 19 West. R. 787 (Man.), in a Court of first instance, is to the contrary effect, but (in the view here taken) would be overruled by *Haji Abdul Rahmon* v. *Mohamed Hassan* [1917] A. C. 209; the decision was also based on the meaning of "land" in the Judgments Act (R. S. M. 1913, c. 107, s. 2) and not the registration statute.

[22] *Port Melbourne* (*Mayor*) v. *Permanent Savings Build. Soc.* (1894) 20 V. L. R. 508. The statute referred to was the same as that under which *Richmond Local Board* v. *Victorian Perm. Build. Soc.* (*supra*) was decided.

[23] *Rutherford* v. *Mitchell* (1904) 15 Man. R. 390. This case was not followed in *Campbell* v. *Imperial Loan Co.* (1908) 8 West R. 502, but the land in the latter case was not registered land.

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tion by mortgagors.[24] On the other hand, the creditor may be barred after a lapse of six years (or similar period) in any personal action against the debtor, if the actual debt is only evidenced by a document not under seal.[25]

Sometimes a power of sale is expressly conferred on the creditor, and even a verbal authority may be sufficient.[26] When no express power of sale is given, the property may be sold by the creditor as owner without notice to the debtor.[27] This of course assumes that no express stipulation in the defeasance agreement has been infringed; but even if there were any such infringement, a duly registered purchaser without notice would be protected.[28] It has been said that it is immaterial (in the absence of fraud) whether the purchaser has or has not notice of the debtor's claim,[29] and this is supported by cases relating to other competing equitable rights, where a caveat might have been but has not been entered, or where a caveat has been allowed to lapse.[30]

It would seem that the creditor is under no necessity to complete his title by taking foreclosure proceedings.[31] but in any case the statutory method of foreclosure could not be employed.[32]

Apart from any question under limitation Acts, it may be difficult to determine the precise limit of time within which the debtor can enforce his right to a transfer. He may in some circumstances not be entitled to sue the creditor for recovery of the land (assuming the latter not to have parted with it) after the date (if any)

[24] *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A. C. 209, where the alternative periods were 12 years for ordinary actions to recover land and 60 years for redemption actions.

[25] *Rutherford* v. *Mitchell, supra.*

[26] *Robinson* v. *McCauley* (1913) 26 West. R. 285 (Man.).

[27] *McMillan* v. *Gunn* (1906) 5 West. R. 479 (Man.), relying on *Oland* v. *McNeil* (1901) 32 Can. S. C. R. 23; and see *Sander* v. *Twigg* (1887) 13 V. L. R. 765. A contrary opinion is expressed in *Wallace* v. *Smart* (1912) 19 West. R. 787 (Man.), but *McMillan* v. *Gunn* does not seem to have been cited.

[28] *Wallace* v. *Smart, supra.*

[29] *McMillan* v. *Gunn, supra.*

[30] See *Union Bank of Canada* v. *Boulter Waugh Lim.* (1919) 58 Can. S. C. R. 385; *Ross* v. *Stovall* [1919] 1 W. W. R. 673 (Al.), where it was said (following *Assets Co.* v. *Mere Roihi* [1905] A. C. 176): "No fraud is shewn, and consequently no ground for setting aside the certificate of title."

[31] *Haji Abdul Rahman* v. *Mohamed Hassan, Rutherford* v. *Mitchell, supra.* In *Wallace* v. *Smart* (*supra*) it seems to have been thought that foreclosure was necessary.

[32] *Rutherford* v. *Mitchell, supra.*

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specified in the defeasance agreement. On the whole, it would seem probable that (unless otherwise stipulated) time would not be regarded as of the essence of the contract, but that the defeasance would be construed like a contract for the sale and purchase of land, so that a reasonable period—not necessarily that assigned by limitation Acts to actions for recovery of land—would be allowed the debtor within which to assert his rights.[33]

SUB-SECTION 2—STATUTORY SECURITIES.

This sub-section is concerned with the same twenty jurisdictions as are dealt with in Sect. 2 *ante,* p. 205, that is, British Columbia and British Honduras are omitted. There is the same distinction for the present purpose between the twenty jurisdictions and these other two as with respect to mortgages. Only in the twenty is provision made for a statutory non-mortgage security.

This statutory security—in some jurisdictions called an "incumbrance," in others a "charge"—is for the purpose of securing on land payment of moneys other than such loans or debts as are usually secured by mortgage. The word "incumbrance" in this sense will be used as little as possible, and the word "charge" will as far as possible be used to include all securities of this kind.[1] The distinction between a mortgage and a charge (in the sense here used) exists in all the statutes, and is in the majority referred to in the definition clauses.

Just as the statutory mortgage secures money by means of charging it on the land and conferring on the creditor powers of realization, in lieu of a conveyance of the debtor's ownership, so the statutory charge effects, by a mere charge coupled with statutory powers, what is effected in the case of unregistered land by the creation of rent-charges and long terms of years.[2] The statutory charge is, however, much more closely assimilated to the statutory mortgage than are rent-charges and terms of years assimilated to legal mortgages in fee.

The statutory charge is so similar to the statutory mortgage in its creation and effect that it will be sufficient to refer for the most part only to the enactments authorizing the creation of the charge, and to point out some of the differences drawn by the statutes between the charge and the mortgage.[3] In all the statutes the method

[33] See note 15, *ante*, p. 292.

[1] As to "incumbrance" and its meanings, see Aust. Torr. Syst. 882, 968; Can. Torr. Syst. 349, 350; Own. & Inc. 108, 109, 126, 135, 205.

[2] See *Mahoney* v. *Hosken* (1912) 14 C. L. R. 378, 384.

[3] See Aust. Torr. Syst. 968-970.

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of creating the charge is precisely the same as in the case of the mortgage; an instrument in prescribed form is directed to be executed and registered, and in all except the Leeward Islands statute the direction is contained in the section that authorizes the mortgage.[4] In some jurisdictions the land may be charged with the payment of any "sum of money," in some with an "annuity" only; but it must be remembered that a statutory mortgage may quite as conveniently be used for the purpose of securing payment of any gross sum.

In England[5] the charge may be of "any principal sum of money with or without interest," or "an annuity or other periodical payment"; in Ireland,[6] "money either with or without interest, and either by way of annuity or otherwise"; in Ontario[7] any "principal sum of money either with or without interest, or as security for any other purpose." In these three jurisdictions there are no separate enactments relating to charges as distinguished from mortgages, the statutes themselves speaking of "charge" only for the most part, and contemplating the insertion of special provisions in the instrument according to the purpose of the "charge." Thus, the right of foreclosure could, in England and Ontario,[8] be exercised by the owner of any "charge," though of course this right would ordinarily be excluded by express stipulation in the case of a non-mortgage charge. In Ireland provisions of s. 44 of the Conveyancing Act 1881 ("annual sums") are expressly made applicable to these charges, and these provisions seem also to be applicable in England.[9]

In New South Wales, Queensland, South Australia, Tasmania, Papua, Fiji, Manitoba, Alberta, and North-West Territories,[10] the charge may be for "an annuity, rent-charge, or sum of money." So in Saskatchewan, but adding the words "other than a debt or loan."[11] In Victoria, Western Australia, Trinidad-Tobago, and Jamaica,[12] the charge may be for "an annuity" only, the intention

[4] L. Is. 1886 (1914), ss. 36, 50.

[5] Eng. 1875, s. 22; 1897, s. 9 (3); 1903-8 Rules, r. 160. Own. & Inc. 122, 188-190, 215, 216; Prec. Reg. Land, 185, 186.

[6] I. 1891, s. 40 (1, 5). A covenant to maintain the covenantee and pay him an annuity was held registrable: *In re Shanahan* [1919] 1 I. R. 131.

[7] On. 1914, s. 30.

[8] Eng. 1875, s. 26; On. 1914, s. 34.

[9] Own. & Inc. 122, 190.

[10] N. S. W. 1900, s. 56; Q. 1861, ss. 56, 59, 60; S. A. 1886, ss. 128, 130, and 1893, ss. 2, 3; Tas. 1862, s. 52; P. 1913, ss. 46, 51, 52; Fi. 1876 (1906), s. 58; M. 1913, ss. 107, 122; Al. 1906, ss. 60, 62A (10); Can. 1906, s. 94.

[11] Sas. 1917, s. 98 (2).

[12] V. 1915, ss. 145, 149; W. A. 1893, ss. 105, 109; Tr. 1902, s. 74; J 1888, ss. 78, 82.

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being apparently that a gross sum should be charged or secured by means of a statutory mortgage. In Victoria, Western Australia, and Jamaica, and also in South Australia, the application of the proceeds of sale by a chargee is provided for separately, and sale by a mortgagee is kept distinct. In South Australia a charge as well as a mortgage implies covenants for payment, &c. In Queensland and Papua "weekly instalments or other periodical payments" may be secured, and the remedy of foreclosure is given to chargees as well as to mortgagees. Foreclosure is also allowed in Manitoba, Alberta, and Saskatchewan.

New Zealand and Federated Malay States [13] resemble England, Ireland, and Ontario in grouping mortgage and charge together in nomenclature, the word used in the New Zealand statute being "mortgage," and in the Federated Malay States "charge"; the different kinds of "mortgage" or "charge" are indicated by the difference in the prescribed forms and (in New Zealand) by the definition clause (s. 2). In both the prescribed form contemplates the charge being for a "sum of money, annuity, or rent-charge."

The Leeward Islands statute adopts an opposite procedure, and this is the only jurisdiction in which the creation of the charge is provided for in enactments distinct from those relating to mortgages. Three forms of charge are given in the schedule, securing any sum of money, an "annuity," or payment of "instalments"; the remedies given to mortgagees and chargees are however grouped together.[14]

The statutory charge constitutes a burden on the ownership of the land, of the same kind as the burden constituted by the statutory mortgage, and confers on the chargee the right to receive from the owner of the land either one or more gross sums of money, or periodical payments of money, though in some jurisdictions gross sums are better secured by mortgage. The introduction of the word "rent-charge" in many of the statutes—"annuity, rent-charge, or sum of money"—is unnecessary. Even where—as in Victoria, Western Australia, Trinidad-Tobago, Jamaica—only an "annuity" is intended to be secured, this annuity "is only a rent-charge called by another name,"[15] rent-charges being really "interests in land which are held as security for money."[16]

The burden on the land thus created is as effective as though

[13] N. Z. 1915, ss. 2 (def. "mortgage"), 101, sch. 2 f. F; F. M. S. 1911, s. 43, sch. 2 f. F ii.

[14] L. Is. 1886 (1914), ss. 50-55, sch. B f. 9; ss. 71-94.

[15] *Mahony* v. *Hosken* (1912) 14 C. L. R. 379, 384.

[16] *Cochrane* v. *Federal Commr. of Land Tax* (1916) 21 C. L. R. 422, 430.

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created by mortgage; in case of an annuity, whether perpetual or for life or other limited period only, the chargee or annuitant has a complete charge over the land for all periodical payments as they accrue due, and for all arrears. In the event of the land being sold and converted into a money fund, the annuitant by virtue of the charge can claim payment (if necessary) out of the corpus of the fund as well as out of the income.[17]

The statutory charge is intended to secure payment of such sums as are ordinarily secured by settlement or gift of annuities.[18] When the sum to be secured is properly a debt or loan, the statutory mortgage is more appropriate, and as regards gross sums a mortgage would seem to be essential in Victoria, Western Australia, Trinidad-Tobago, and Jamaica. Only in one jurisdiction—Saskatchewan [19]—is the money secured expressly required to be "other than a debt or loan," but apart from this enactment it seems to be held in Canada that a transaction which is in fact a mortgage should not be embodied in a statutory charge;[20] in the case cited the instrument was held to be unregistrable. A statutory instrument of charge embodying a mortgage transaction does however create, even in Canada, a valid equitable mortgage that can be protected by caveat.[21]

That an annuity created by means of a statutory charge is merely a security for the performance of a covenant is no objection to the registrability of the instrument; in this way the beer covenants relating to a tied public house have been secured, the periodic sums not being payable so long as the covenants are duly observed.[22]

The provisions contained in the statutes for transferring mortgages relate also to charges.

The provisions contained in the statutes for the discharge of mortgages in the same way include charges. But in the majority of those jurisdictions in which mortgage and charge are distinguished, the enactment providing for payment of the amount due to a public official, in the absence of the mortgagee, applies to mortgages only and not to charges, and a special enactment is inserted relating to charges only; under this enactment the cessation of the charge may be entered in the register on proof to the registry that the "annuitant" is dead, or that the money has ceased for other

[17] *Brown* v. *Abbott* (1908) 5 C. L. R. 487.

[18] Illustrations are: *Cooper* v. *Strapps* (1872) 6 S. A. R. 57: *Brown* v. *Abbott, supra; Gebhardt* v. *Dempster* [1914] S. A. R. 287. And see Conv. Prec. 564; Prec. Reg. Land. 185, 186.

[19] Sas. 1917, s. 98 (2); Can. Torr. Syst. 349.

[20] *Re Rumely Co.* (1911) 17 West. R. 160 (Sas.).

[21] *Imperial Elevator Co.* v. *Olive* (1914) 29 West. R. 339 (Sas.); *Coast Lumber Co.* v. *McLeod, ib.* 357.

[22] *Mahony* v. *Hosken* (1912) 14 C. L. R. 379.

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reasons to be payable. The jurisdictions referred to are the seven Australian,[23] Fiji, Trinidad-Tobago, Jamaica,[24] and four of the Canadian.[25] In New Zealand and Federated Malay States [26] the statutes contain both enactments, though in the former "mortgage," and in the latter "charge," is used for both mortgage and charge; the Malay enactment, however, omits the word "annuitant."

SUB-SECTION 3—SECURITIES (NON-MORTGAGE) IN BRITISH COLUMBIA AND BRITISH HONDURAS

This sub-section is concerned with British Columbia and British Honduras only, and only with charges (other than mortgages) corresponding to the statutory charge of the twenty jurisdictions which form the subject of the preceding sub-sec. 2 *ante,* p. 295. Securities created by transfer and defeasance are the subject of sub-sect. 1, *ante,* p. 289, which includes in its scope British Columbia and British Honduras as well as the other twenty jurisdictions.

BRITISH COLUMBIA.

As the British Columbia statutes make no provision for a statutory mortgage, so they make none for a statutory charge. It is contemplated that a security may be created which bears the same relation to a mortgage as the statutory charge in other jurisdictions bears to the statutory mortgage. The nomenclature is however even more confusing than elsewhere, "mortgage," "charge," and "incumbrance" being used in the loosest way, sometimes as synonymous terms and sometimes by way of distinction from each other. As in many other jurisdictions the word "incumbrance" is also specially used for the non-mortgage security or charge here dealt with.

The definitions of "charge" and "mortgage" in the statutes [1] are referred to in Sect. 3 *ante,* p. 276. "Incumbrance"—the charge now under consideration—is defined as "any charge or lien on land (other than a mortgage), or an hypothecation of such charge or lien." "Incumbrancer" is "the owner of any land, or

[23] N. S. W. 1900, ss. 66, 67; Q. 1861, ss. 63, 64; S. A. 1886, ss. 145, 146; Tas. 1862, ss. 60, 61; V. 1915, ss. 164, 165; W. A. 1893, ss. 125, 126; P. 1913, ss. 55, 56.

[24] Fi. 1876 (1906), ss. 73, 74; Tr. 1902, ss. 82, 85; J. 1888, ss. 97, 98.

[25] M. 1913, ss. 113, 125; Sas. 1917, ss. 119, 120; Al. 1906, ss. 64, 65; Can. 1906, ss. 101, 102.

[26] N. Z. 1915, ss. 117, 122; F. M. S. 1911, ss. 55, 56.

[1] B. C. 1911, s. 2.

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of an estate or interest in land, subject to an incumbrance," and "incumbrancee" is "the owner of an incumbrance." In this book (as stated in sub-sect. 2 *ante*, p. 295) the use of the word "incumbrance" in this sense is avoided as much as possible.

Beyond these definitions no special reference is made in the statutes to these non-mortgage charges. They are sometimes bracketed with mortgages, and sometimes mortgages alone are mentioned. Generally speaking, most provisions relating to "charges" in the widest sense apply to these charges as well as to mortgages, and even less distinction is made between the mortgage and the charge than in other jurisdictions. Mortgages in British Columbia are the subject of Sect. 3 *ante*, p. 275, and non-mortgage charges in other jurisdictions the subject of sub-sect. 2 *ante*, p. 295.

BRITISH HONDURAS.

The only special reference in the British Honduras statute to charge, as distinguished from mortgage, is in the definition clause. In other respects the observations on mortgages in Sect. 3 *ante*, p. 277, apply to charges.

The registration statute,[2] besides including a "legal or equitable mortgage in fee" in the definition of "incumbrance," also includes in the same term "any money secured or charged on land by trust or" order of court, and "any legacy, portion, lien or other charge whereby a gross sum is secured," and "any annual or periodical charge . . . repurchasable on payment of a gross sum," and "any arrear remaining unpaid of any annual or periodical charge for payment of which" sale "might be decreed by the Supreme Court."

Any such charge as above referred to could of course be created by any ordinary instrument, just as a mortgage could be created by an ordinary instrument. Reference may be made to Sect. 3 *ante*, p. 275, and (as to non-mortgage charges in other jurisdictions) to sub-sect. 2 *ante*, p. 295.

[2] B. H. 1914, s. 1.

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CHAPTER VII—SALE, TRANSFER, LEASE.

SECTION 1—TRANSFER ON SALE.

SUB-SECTION 1—CONTRACTS FOR SALE.

There is the same practical necessity for a preliminary contract of sale being executed with respect to registered, as with respect to unregistered, land. The registered owner has, as vendor, the right to sue for the purchase money.[1] The purchaser on his part has the same right to specific performance and other rights under the contract—as for instance the right to possession in some circumstances—as if the land were not on the register. These rights in the purchaser are explicitly laid down in decided cases,[2] and also implied by the many references to contracts contained in the registration statutes themselves.[3] In particular the system of cautions and caveats implies the possibility of a contract relating to registered land being enforceable against the registered owner. In the majority of jurisdictions the statutes expressly refer to the enforcement of contracts,[4] and it has been held that the right to specific performance conferred by the statutes on a vendor implies a reciprocal right in the purchaser.[5] In many statutes contracts are in other ways recognized as effective.[6] The contract may also be just as effective in preserving—as also it may fail to preserve—rights in the vendor after the land is fully assured to the purchaser, as

[1] *Cuthbertson* v. *Swan* (1877) 11 S. A. R. 102; *Maybery* v. *Williams* (1910) 15 West. R. 553 (Sas.).

[2] For instance: *In re Scanlan* (1887) 3 Q. L. J. 43; *South Melbourne (Mayor)* v. *Taylor* (1891) 17 V. L. R. 167.

[3] Two important cases—one in the Privy Council, the other in the House of Lords — on specific performance, from the purchaser's and vendor's points of view respectively, may be here referred to, though not concerned specially with registered land: *Howard* v. *Miller* [1915] A. C. 318; *McGrory* v. *Alderdale Estate Co.* [1918] A. C. 503 (cited in *Can. Pac. Ry.* v. *Blunt* [1918] 3 W. W. R. 219).

[4] Eng. 1875, s. 93; I. 1891, s. 17; On. 1914, s. 114; N. S. W. 1900, s. 44; Q. 1861, s. 96; Tas. 1862, s. 115; V. 1915, s. 71; W. A. 1893, s. 67; P. 1913, s. 31; Tr. 1902, s. 132; J. 1888, s. 54; L. Is. 1886 (1914), s. 6. In Leeward Islands it is implied that a contract may be registered at the ordinary deeds registry.

[5] *In re Scanlan, supra.*

[6] Q. 1877, s. 51; S. A. 1886, s. 249; V. 1915, s. 278; W. A. 1893, s. 237; Fi. 1876 (1906), s. 117; M. 1913, ss. 29, 64; Sas. 1917, s. 205; Al. 1906, ss. 93, 101, 124, 139; Can. 1906, s. 4; B. C. 1911, s. 61. In Manitoba a contract may be registered at the ordinary deeds registry.

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under the ordinary law relating to unregistered land.[7] The registration statutes do not, as a rule, modify the ordinary law with respect to contracts or agreements for sale.[8] There are however some exceptions, and a few instances may here be noticed.

One exception is referred to in the case just cited. In Alberta a contract is made assignable "both at law and in equity" and "notwithstanding anything to the contrary therein contained."[9] In Alberta also a contract for sale by reference to an unregistered plan is prohibited and made illegal.[10] In Manitoba and British Columbia such a sale is voidable at the option of the purchaser.[11] In British Columbia a vendor selling for purchase money payable by instalments must furnish the purchaser with a registrable contract, and he must also have his own title registered,[12] though the non-registration of the contract will not prevent the vendor from recovering the purchase money by action.[13] In British Columbia also a contract, to pass even an equitable interest in the land, must be registered, and provision is made for having the registration cancelled on breach of the contract.[14] In England the purchaser is precluded from requiring evidence of title beyond (in general) that afforded by the register, when the title is fully warranted;[15] the rule thus expressly laid down is in practice acted on in other jurisdictions.

The practice on sales by the court may be affected by the circumstance that the land is registered, for such a sale is sometimes made subject to all incumbrances (including taxes).[16]

The question may be raised whether the interest which forms the subject of the contract is registered land or not. Thus, in England a mortgagee of leasehold land by demise has been held, when selling his interest under the sub-term, not to be a vendor of registered land.[17]

[7] *Foster* v. *Stiffler* (1909) 19 Man. R. 533; *Freeman* v. *Calverley* (1916) 34 West. R. 514 (Man.); *Re Jamieson Caveat* (1913) 23 West. R. 921 (Sas.); *Brader* v. *Glenn* (1914) 29 West. R. 368 (Sas.); *Blackham* v. *Haythorpe* (1917) 3 C. L. R. 156.

[8] *Raymond Land Co.* v. *Knight Sugar Co.* (1909) 11 West. R. 687 (Al.).

[9] Al. 1906, s. 101. See p. 309, *post*.

[10] Al. 1906, s. 124. See as to plans, *post*, p. 318.

[11] M. 1913, s. 64; B. C. 1911, s. 94.

[12] B. C. 1911, s. 61.

[13] *McDonnell* v. *McClymont* (1915) 22 B. C. R. 1.

[14] B. C. 1911, ss. 104, 150; *Howard* v. *Miller* [1915] A. C. 318, 326.

[15] Eng. 1897, s. 16.

[16] *Canada Perm. Mortgage Corp.* v. *Martin* (1909) 12 West. R. 440 (Sas.); Can. Torr. Syst. 330.

[17] *In re Voss and Saunders' Cont.* [1911] 1 Ch. 42. See Own. & Inc. 163; Prec. Reg. Land, 34.

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The written contract is, for the most part, to be construed in the same way as an ordinary contract, and without reference to the fact that the land sold is, and purports to be, on the register. Thus, the contract is not to be read as embodying the description of the parcels on the register; if the owner's registered title is subject to reservations in the original grant from the Crown, and the contract is silent as to any such reservation, the vendor may be unable to get specific performance and the purchaser may be entitled to damages.[18]

So any question of "parcel or no parcel" arising on the construction of the contract is determined without reference to the fact of registration.[19] A reference to the register in the contract will not always make the register evidence of the identity of the vendor.[20] The meaning of particular clauses and stipulations in contracts for sale is constantly determined by the courts without reference to the fact of the land being registered land.[21]

If the land did not even purport to be on the register, the purchaser might not be entitled—at all events under an open contract—to treat all the provisions of the registration statutes as applicable;[22] thus, in the case cited the purchaser was not entitled to withhold payment of purchase money until his conveyance was registered, although under the stringent provisions of the British Columbia statute no estate "at law or in equity" passes until registration.

If however it is clear from the terms of the contract that the land sold is, or purports to be, on the register, the provisions of the registration statutes necessarily affect the procedure for completing the sale, apart from the actual construction of the contract itself. This procedure differs in several respects from that usually followed with regard to unregistered land, particularly as to furnishing an abstract of the vendor's title and the payment over of the purchase money on completion. These points will be referred to later on.

The contract may expressly or impliedly assert that the land sold is on the register, when as a matter of fact this is not so. The

[18] *Neild* v. *Davidson* (1890) 11 N. S. W. Eq. 209; *Raymond Land Co.* v. *Knight Sugar Co.* (1909) 11 West. R. 687 (Al.).

[19] *Donaldson* v. *Hemmant* (1901) 11 Q. L. J. 35.

[20] *Arthur & Co.* v. *Cullen* [1917] N. Z. R. 706.

[21] *Macgregor* v. *Templeton* (1882) 8 V. L. R. 195; *Richardson* v. *Kearton*, *ib.* 201; *Perrin* v. *Reynolds* (1886) 12 V. L. R. 440; *Perry* v. *Sherlock* (1888) 14 V. L. R. 492; *Solomons* v. *Halloran* (1906) 7 S. R. (N. S. W.) 32; *Cushing* v. *Knight* (1912) 46 Can. S. C. R. 555; *Sutton* v. *Cary* (1916) 16 S. R. (N. S. W.) 254.

[22] *Thompson* v. *McDonold* (1914) 20 B. C. R. 223. See B. C. 1911, s. 104.

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purchaser will then be entitled either to damages for breach of the contract,[23] under some circumstances to rescission,[24] or (if the vendor's title is good) to specific performance by having the land placed on the register at the expeuse of the vendor.[25] The measure of damages, apart from return of deposit, &c., will be the extra expense of having legal advice, on the assumption that such advice would not have been necessary had the land been on the register.[26] If the purchaser does not rely on the representation as to the land being registered, and does not buy on the faith of it, he will not be allowed to deduct from the purchase money the cost of placing the land on the register.[27] The promise of the vendor to pay the cost of initial registration, when such a promise is made subsequently to the contract being entered into, is merely *nudum pactum*; but a promise to have the land placed on the register, made for sufficient consideration, need not be in writing in order to be enforceable as a contract.[28] Specific performance may be refused to a vendor who untruly represents the land to be registered.[29]

Sometimes a contract for the sale of unregistered land contains a clause expressly binding the vendor to place the land on the register. When a date is fixed for completion of initial registration, time will be considered to be of the essence of the contract;[30] but when no date is fixed, the purchaser can only get damages if the delay is unreasonable and on that footing.[31] Any purchaser of unregistered land may usually—of course at his own expense—obtain initial registration without having a formal conveyance from his vendor, and in such a case no conveyance is necessary, the purchaser being registered as owner in lieu of having the land conveyed to him.[32] In Jamaica,[33] such a purchaser may, in the absence of contrary stipulation, require his vendor to have him placed upon the register as owner with a fully warranted or "absolute" title in lieu of making a formal conveyance to him.

[23] *Skinner* v. *Australian and British Land Co.* (1889) 15 V. L. R. 674.

[24] *Rodgers* v. *King* (1888) 4 W. N. (N. S. W.) 157.

[25] *Matthews* v. *Jones* (1882) 8 V. L. R. 188; *Fischer* v. *Bennett* (1911) 11 S. R. (N. S. W.) 399; *Smith* v. *Ernst* (1912) 22 Man. R. 363.

[26] *Skinner* v. *Australian and British Land Co., supra.* The damages in this case were assessed at £3.10.0, and the deposit does not seem to have been returned.

[27] *Watson* v. *Watson* (1886) 12 V. L. R. 433.

[28] *Watson* v. *Watson, supra; Smith* v. *Ernst* (1912) 22 Man. R. 363; and see *Coker* v. *Spence* (1876) 2 V. L. R. L. 273.

[29] *Rowsell* v. *Riddell* [1919] N. Z. R. 57.

[30] *Davis* v. *Dougall* (1889) 15 V. L. R. 424.

[31] *Hacker* v. *Australian Property Co.* (1890) 17 V. L. R. 376.

[32] Aust. Torr. Syst. 725; *ante*, p. 38.

[33] J. 1894, ss. 1-3.

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Apart from any special conditions of sale or clauses in the agreement, a contract for the sale of registered land undoubtedly confers on the purchaser the right to have the contract specifically performed by being placed on the register as owner of the land in the stead of the vendor. This right the purchaser may protect by entering a caveat or caution,[34] or (in British Columbia) by registering his contract.[35]

One of the purchaser's rights subsidiary to the main right of obtaining the registered ownership is that the vendor should shew his title,[36] which is usually done in the case of unregistered land by delivering an abstract of title. The difference made by the statutory system of conveyancing with respect to proof of title has led to a change in the practice regarding abstracts. What is usually known as an abstract of title is a summary of the contents of the documents that constitute the vendor's claim of title. Since an owner's title by warranted registration does not depend on any chain of title, an abstract of title in the ordinary sense is unnecessary and cannot usually be required from a vendor.[37] Its place would be sufficiently supplied by any reference to the register that enabled the purchaser to ascertain the state of the vendor's title. In England there are express enactments as to the evidence of registered title with which a purchaser is to be satisfied,[38] and the inference from these seems to be that an abstract of the register entries is not required. The reference to the register is in some Australasian jurisdictions styled "particulars of title,"[39] and the expression "abstract of title" is applied only to the summary of the documents in a chain of title. But in some of the Canadian jurisdictions "abstract," "abstract of title," and "abstract of registrations," are used to denote an officially certified statement furnished by the registry for the purpose of shewing the state of the register with respect to the vendor's title. Such an abstract is distinguished

[34] *Howard* v. *Currie* (1879) 5 V. L. R. 87; *Hill* v. *Keene* (1903) 23 N. Z. R. 404; *Holmsted* v. *Canadian Northern Ry. Co.* (1914) 29 West. R. 108 (Sas.); Aust. Torr. Syst. 1036; Own. & Inc. 131.

[35] B. C. 1911, s. 104; *Howard* v. *Miller* [1915] A. C. 318, 326.

[36] *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575, 578; *Newberry* v *Langan* (1912) 47 Can. S. C. R. 114, 124.

[37] *Davidson* v. *Brown* (1879) 5 V. L. R. L. 288; *Newberry* v. *Langan, supra; Auriol* v. *Alberta Land Co.* (1912) 20 West. R. 185, 189 (Al.); Own. & Inc. 166, 167; Wms. V. & P. (2nd Ed.) 1170 *et seq.*

[38] Eng. 1875, s. 104; 1897, s. 16; 1903-8 Rules, r. 284.

[39] Conv. & Prop. L. 36. In practice abstracts of title are not used in Victoria, even in the case of unregistered land; so in New Zealand: Martin's Conv. in N. Z. 49, Suppl. 128.

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from a "solicitor's abstract"—a summary of the documents constituting a vendor's title.[40]

When the title, or part of it, is not fully warranted, different considerations apply, and so far as the unwarranted title extends it would seem that the old rules relating to abstracts of title, &c., would still govern the rights of the parties,[41] and so à fortiori if the land is an interest carved out of the registered estate, and therefore not itself the subject of an entry on the register—not in fact "registered land" as strictly defined.[42]

As under an ordinary open contract a purchaser can require the vendor to shew his title, so the vendor can insist on the purchase money being paid him upon his executing a complete assurance of the land sold. In the case of registered land this right of the vendor is modified, just as the method of shewing title is modified. Since it is registration, and not the mere execution of an instrument of assurance, that vests the vendor's land in the purchaser,[43] the strict right of the vendor who has engaged to give a registered title would seem to be payment of the purchase money only upon registration of the purchaser as owner.[44] This may not always be insisted on in practice, but the vendor is at all events bound to have the register in such a state that the purchaser's instrument of transfer can at once be registered.[45] This would often involve settling a sale and purchase transaction at the registry office itself.[46]

The agreement to shew a registered title does not in itself imply that the vendor is actually the registered owner, though it does of course imply that the purchaser will by some means be placed upon the register as owner, and the statutory provision on this subject in

[40] *Newberry* v. *Langan*, and *Auriol* v. *Alberta Land Co., supra; Canada Perm. Mortgage Corp.* v. *Martin* (1909) 12 West. R. 440 (Sas.); Can. Torr. Syst. 150.

[41] Own. & Inc. 168; Wms. V. & P. (2nd Ed.) 1171; *Newberry* v. *Langan* (1912) 47 Can. S. C. R. 114.

[42] See *In re Voss and Saunders' Cont.* [1911] 1 Ch. 42 (under Eng. 1897, s. 16).

[43] *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575; *Taylor* v. *Land Mortg. Bank* (1886) 12 V. L. R. 748.

[44] *Cornish* v. *Cargeeg* [1886] S. A. R. 108, 115, 120; *Auriol* v. *Alberta Land Co.* (1912) 20 West. R. 185 (Al.); Own. & Inc. 182, 185; Wms. V. & P. 1183 *et seq.* (2nd Ed.). See also *Thompson* v. *McDonald* (1914) 20 B. C. R. 223, though in British Columbia the vendor under an open contract is sometimes bound to shew a registered title: B. C. 1911, s. 61.

[45] *Taylor* v. *Land Mortg. Bank* (1886) 12 V. L. R. 748; Aust. Torr. Syst. 842, 900.

[46] See *Simson* v. *Young* [1917] 1 W. W. R. 1141, 1147 (Al.); (1918) 56 Can. S. C. R. 388, 411. Reference was made to Own. & Inc. 187, and Wms. V. & P. (2nd Ed.) 1186.

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England seems in harmony with cases elsewhere.[47] The contract may of course be so worded as to bind the vendor to shew a registered title in his own name,[48] or the purchaser may expressly agree to accept a transfer from some person other than the vendor.[49]

In the event of specific performance being ordered, one result of the greater simplicity of a registered title is that there is seldom any necessity for a reference as to title being included in the order of the court.[50]

When the contract is not an open one, the clauses inserted by way of express agreement are in some jurisdictions nearly as numerous and special as in the case of unregistered land. References to forms of conditions of sale are given in the note.[51] In Victoria and Western Australia [52] the statutes enable a scheduled set of conditions to be embodied by reference in the contract.

When provision is made for the execution of a statutory transfer by the vendor, this implies that the instrument to be so executed shall be capable of registration and thus vest the land in the purchaser.[53] But the vendor's obligation to give such an instrument does not arise until the whole of the purchase money is paid, where the contract provides for payment by instalments.[54] "Completion," as under ordinary law, sometimes means merely payment of part of the purchase money coupled with acceptance of title;[55] in such a case the purchaser might be entitled to possession, but not to have a transfer executed.

If the contract contains a clause binding the vendor to produce his certificate of title for the purchaser's inspection, this implies that the production must be formally applied for by the purchaser.[56]

Where the purchaser has been held entitled to damages for the vendor's breach of the contract, the question has been raised

[47] Eng. 1897, s. 16 (2); *Forbes* v. *Butler* (1903) 29 V. L. R. 374.

[48] *Stoddart* v. *Wood* (1889) 15 V. L. R. 457.

[49] *General Finance Co.* v. *Perpetual Executors Assoc.* (1902) 27 V. L. R. 739.

[50] *Embling* v. *Whitchell* (1878) 4 V. L. R. 96; *Perry* v. *Sherlock* (1888) 14 V. L. R. 492. A reference was ordered in *Smith* v. *Crawford* [1918] 2 W. W. R. 298 (Sas.).

[51] Prec. Reg. Land, 1-34; Br. & Sh. 578-585; Bro. & Gl. 370; Conv. Prec. 5; Conv. & Prop. L. 45, 51, 52; Hutch. 214; Can. Torr. Syst. 666, 671.

[52] V. 1915, s. 278, sch. 25; W. A. 1893, s. 237, sch. 26.

[53] *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575, 578; *Auriol* v. *Alberta Land Co.* (1912) 20 West R. 185 (Al.).

[54] *Ryan* v. *Fergerson* (1909) 8 C. L. R. 731; *Hill* v. *Keene* (1903) 23 N. Z. R. 404.

[55] *Sutton* v. *Cary* (1916) 16 S. R. (N. S. W.) 254, 257.

[56] *Perry* v. *Sherlock* (1888) 14 V. L. R. 492.

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whether the rule laid down in *Flureau* v. *Thornhill* and *Bain* v. *Fothergill*[57] applies to registered land—that on a sale of land damages are not recoverable for loss of bargain where the vendor through no fault of his own is unable to make title. In several cases damages for loss of bargain have been given on the ground that the vendor was in fault,[58] and on the authority of *Engell* v. *Fitch*.[59] But where the vendor has not been in fault, the rule in *Bain* v. *Fothergill* has been held in several jurisdictions to apply, and so bar the right of a purchaser to damages for loss of bargain.[60] On the other hand it has been suggested that the general rule as laid down in *Bain* v. *Fothergill* will not apply to registered land, and that there should be no distinction between damages for loss of bargain and other damages for breach of contract by a vendor;[61] but this suggestion seems to be overborne by authority.

Some of the cases just cited turned on the vendor having put it out of his power to complete his contract by conveying away, or giving interests in, the land to third persons.[62] This he is not entitled to do, though he is at liberty to assign the purchase moneys and other benefits of the contract.[63] The rule would seem to be the same with respect to registered land as under the ordinary law; but a vendor has been held in New South Wales to have committed no breach of contract in transferring the land to a third person.[64]

The purchaser can of course assign the benefit of his contract, as under the ordinary law. Cases occur, particularly in some of the Canadian jurisdictions, where the contract is made assignable

[57] (1775) 2 W. Bl. 1078; (1874) L. R. 7 H. L. 158.

[58] *Edwards* v. *Freeborn* (1877) 11 S. A. R. 128; *Ross* v. *Robinson* (1886) 12 V. L. R. 764; *Colonial Invest. Co.* v. *Cobain* (1888) 14 V. L. R. 740; *Mailer* v. *Clayton* (1899) 1 W. A. R. 3; *O'Neil* v. *Drinkle* (1908) 8 West. R. 937 (Sas.); *Liao Ng* v. *Koh Vun* (1911) Innes F. M. S. 142; *Solomon* v. *Litchfield* (1916) 16 S. R. (N. S. W.) 610.

[59] (1869) L. R. 4 Q. B. 659.

[60] *Merry* v. *Australian Mut. Prov. Soc.* (1872) 3 Q. S. C. R. 40, 63; *Perrin* v. *Reynolds* (1886) 12 V. L. R. 440; *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575, 580; *Maitland* v. *Matthews* (1915) 31 West. R. 165 (Al.); *Besnard* v. *La Corporation Episcopale* (1916) 34 West. R. 721 (Sas.). In *Reschke* v. *Hensley* [1913] S. A. R. 105, 114, *Bain* v. *Fothergill*, which was there distinguished, was said to be "indisputable law," though the land in question was on the register. And see Own. & Inc. 272; Can. Torr. Syst. 151.

[61] *Mailer* v. *Clayton*, *supra*; *O'Neil* v. *Drinkle*, *supra*; *Joske* v. *Huon* (1882) Udal's Fiji R. 68; Innes F. M. S. 55.

[62] *Edwards* v. *Freeborn*, *supra*; *Ross* v. *Robinson*, *supra*.

[63] *Ross* v. *Robinson*, *supra*; *Rowe* v. *Equity Trustees* (1895) 21 V. L. R. 762; *Grace* v. *Kuebler* (1917) 56 Can. S. C. R. 1; Own. & Inc. 76, 272; Wms. V. & P. (2nd Ed.) 564.

[64] *Fama* v. *White* (1906) 6 S. R. (N. S. W.) 415. See however, in particular, *Grace* v. *Kuebler*, *supra*.

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only with the vendor's consent.[65] In Alberta it is enacted that a contract "shall notwithstanding anything to the contrary therein contained be assignable," and the assignee takes the assignor's interest "both at law and in equity"; notice must be given to the original vendor.[66]

The purchaser may, in discovering that his vendor cannot give him a good title, recover back any moneys paid, as under ordinary law; omission to search and to discover the defect in title will not preclude the recovery of the moneys so paid, the register not being notice to this extent.[67]

SUB-SECTION 2—THE STATUTORY TRANSFER.

In twenty jurisdictions the alienation of registered interests on sale must ordinarily be effected by the execution and registration of an instrument in prescribed form. In British Columbia and British Honduras the use of statutory instruments is permissive only and not compulsory, and these two jurisdictions will be dealt with in the next sub-section (sub-sect. 3, *post*, p. 329).

The scheme of the system as a whole is to give statutory sanction to the transfer of land, and of such interests as mortgages and leases, by registered owners, and to give the like sanction to the transfer of land and interests in it by mortgagees under power of sale, and by the sheriff or other judicial officer on behalf of owners. There are many points of difference in the various jurisdictions, and these differences vary greatly in importance and scope.

What has already been said as to the execution, attestation, and registration of instruments of mortgage applies for the most part to instruments of transfer (*ante*, pp. 221-236).

England, Ireland, and Ontario [1] stand by themselves, and differ on some important points from other jurisdictions. A registered owner "may" [2] transfer his land (freehold or leasehold), or part of it, by an instrument in prescribed form, and the transferee is to be registered as owner. In England and Ontario the transferor is, until registration of the transferee, "deemed to remain" owner of the land, and in Ireland, until registration, the transferee has not

[65] An illustration is *McKillop* v. *Alexander* (1912) 45 Can. S. C. R. 551.

[66] Al. 1906, s. 101.

[67] *Christie* v. *Taylor* (1914) 26 West. R. 673 (Al.).

[1] Eng. 1875, ss. 29, 39; 1897, s. 6; 1903-8 Rules, rr. 97-125, 126-157, 168, 182; Own. & Inc. 172-175, 209. I. 1891, ss. 35, 53; 1900 O. 4, rr. 1, 2; f. 9. On. 1914, ss. 38, 48, 69 (1), 102; 1911 Rules, rr. 33-36, 56-64, 66, 67.

[2] As to "may" being in effect peremptory, see under "Mortgages" *ante*, p. 206.

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"any estate in the lands." These expressions do not appear to mean quite the same thing, and the Irish enactment has been interpreted literally as meaning that the transferee has no estate at law or in equity until registration.[3] In Ontario the transferee has conferred upon him by the executed instrument "a right to be registered," and this seems to be implied by the English and Irish enactments.[4] In England and Ireland the prescribed forms of transfer are under seal, but in Ontario sealing is unnecessary, and the instrument has "the same effect for all purposes as if it were made under seal."[5] In England and Ontario the prescribed form of transfer contemplates the whole interest of the transferor passing to the transferee, and no words of limitation are necessary; but in Ireland the prescribed form of a transfer of the fee simple contains an habendum "unto and to the use of the transferee in fee simple," though the insertion of these words appears not to be necessary, and is not always insisted on by the registry.[6] In England and Ireland the registered owner may be actually a limited owner only, and provision is made for protecting interests under the settlement, whilst in England a special form of transfer "to the uses of a settlement" is prescribed.[7] Apart from these provisions the statutes do not contemplate the creation of life estates or estates in remainder on the register.[8]

Provision is made for the transfer of land by a mortgagee under his power of sale. In England and Ontario this transfer by the mortgagee takes effect "as if he were the registered" owner of the land; in Ireland the transferee's registration has "the same effect as registration on a transfer for valuable consideration by a registered owner."[9] In Ontario provision is also made for transfer upon sale of the land under an execution or for taxes;[10] in England and Ireland a judgment creditor can only obtain a charge (in Ireland a judgment-mortgage) on the land enforceable by the pro-

[3] *Torish* v. *Orr* [1894] 2 I. R. 330; *Pim* v. *Coyle* [1907] 1 I. R. 330; *McGettigan* v. *Roulstone* [1910] 2 I. R. 17; *Mooney* v. *McMahon* [1911] 1 I. R. 125. See under "Unregistered transactions" *ante*, p. 114.

[4] On. 1914, s. 69 (1). So in the Australian jurisdictions the right to be registered expressly conferred by some statutes has been held to be implied in others: *Barry* v. *Heider* (1914) 19 C. L. R. 197; Q. 1877, s. 48; S. A. 1886, s. 246.

[5] On. 1914, s. 102; *Beatty* v. *Bailey* (1912) 26 O. L. R. 145, 149.

[6] I. 1910 O. 4, r. 1, f. 9; Bro. & Gl. 141. See Own. & Inc. 172, 173, as to both England and Ontario.

[7] Eng. 1897, s. 6 (3); 1903-8 Rules, r. 128; f. 22. I. 1891, s. 35.

[8] Own. & Inc. 51; Bro. & Gl. 48, 156, 178.

[9] Eng. 1875, s. 27; I. 1891, s. 40 (6); On. 1914, s. 35. See under "Mortgages," *ante*, p. 250.

[10] On. 1914, ss. 65, 66.

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ceedings applicable to equitable mortgages.[11] The purchaser at a sale for taxes in Ontario is liable, if he delay in entering a caution or registering his transfer, to be postponed (even after registration) to an unregistered purchaser from the owner of the land.[12]

The transfer of mortgages (or "charges") is expressly authorized in all three jurisdictions, though not in precisely the same terms.[13] The transfer of leases is not provided for, since leases are not registered but merely protected by notice on the register.

These three jurisdictions differ from all others in enacting—in the sections which expressly permit transactions off the register—that registered dispositions can only be made by registered owners; the case of an instrument being executed by a person who is not yet registered as owner is expressly provided for in England and Ontario, though no practical necessity for such an enactment appears to have arisen in Ireland.[14]

Plans, as part of the registration system, are sometimes required in connexion with transfers of land, and are provided for by the statute itself in Ontario and by rules in England and Ireland.[15] Plans are merely intended to identify the land; they may also serve to give notice to purchasers of rights over the land, when any such right has been properly created.[16]

The method of completing a transaction of transfer by registration consists not merely in recording the instrument and entering it on the register so as to confer certain rights on the person taking under the instrument, but the transferee is entered on the register as owner of the land (or charge, as the case may be) in place of the transferor.[17] The substitution of the transferee as owner in place of the transferor is complete on the register itself, and the effect of the registration does not depend on whether a new

[11] Eng. 1875, s. 53; Land Charges Acts 1888 and 1900. I. 1891, s. 21; Bro. & Gl. 119-122. An analogous practice obtains in Manitoba: Can. Torr. Syst. 256; Judgments Act (R. S. Man. 1913, c. 107), s. 3.

[12] *Re Lord and Ellis* (1914) 30 O. L. R. 582, though apparently decided without reference to On. 1914, s. 66, as now amended.

[13] Eng. 1875, s. 40; 1903-8 Rules, rr. 97-125, 151, 157, 168, 174. I. 1891, s. 41. On. 1914, s. 54. See under "Mortgages," *ante*, p. 195.

[14] Eng. 1875, s. 49; 1897, s. 9 (6); 1903-8 Rules, rr. 96, 104. I. 1891, s. 44. On. 1914, ss. 68, 69. See Own. & Inc. 188; Bro. & Gl. 142; Aust. Torr. Syst. 912; Can. Torr. Syst. 230; under "Mortgages," *ante*, p. 231.

[15] Eng. 1903-8 Rules, rr. 269-283; I. 1910 O. 9, rr. 1, 2; On. 1914, ss. 105-111. And see references in note 1, *supra*.

[16] *Sumner* v. *McIntosh* [1918] 2 W. W. R. 293 (Sas.) would seem to apply.

[17] Eng. 1875, ss. 29, 34, 40; Br. & Sh. 631 *et seq.* (model registers). I. 1891, ss. 35, 41; Bro. & Gl. 351 *et seq.* (examples of register). On. 1914, ss. 38, 48, 54; 1911 Rules, r. 65 (form of register).

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page or folium of the register is opened for the transferee, or whether the new ownership of the latter is entered on the same page or folium as the former ownership of the transferor.[18]

The statutes in all three jurisdictions agree in drawing a distinction between transfers of land for and without valuable consideration. In other respects there are differences as to the effect of the registration of transfers, whether of land or charges on land. A transfer of land without valuable consideration is, so far as concerns the transferee, subject to the same unregistered interests as before the transfer, but otherwise "when registered" it operates as a transfer for value does.[19] Under these enactments transfers from one who is merely an agent, and transfers by way of assignment for benefit of creditors, will, though registered, be subject to other interests unregistered but obtained for value.[20]

In England and Ontario [21] a transfer of freehold land for value, "when registered," confers on the transferee an "estate in fee simple" with its appurtenant rights, subject to registered or noted incumbrances and certain statutory quasi-incumbrances, "but free from all other estates and interests" including those of the Crown; if the title is not fully warranted, the transferee takes subject to the same qualifications as his transferor, and it may be that the mines will not always vest in the transferee, unless by virtue of a separate transfer and registration. In England certain of the provisions of the Conveyancing Acts are also incorporated (s. 9). A transfer of leasehold land for value will, "when registered," vest in the transferee "the land transferred for all the leasehold estate described in the registered lease," subject to the incidents of the leasehold estate and otherwise as in the case of freehold land; covenants by transferor and transferee are also implied "on the transfer of" leasehold land—presumably on the completion of the transfer by registration—and (in England) on the transfer of freehold land subject to a rent.[22] In Ireland transfer of leasehold land is by a general enactment assimilated to that of freehold, and a distinction is made as to the effect of registering a transferee as "full owner" or "limited owner." [23] On registration of a transferee as

[18] This question is of practical importance in some other jurisdictions, and amending enactments have been considered necessary: for instance, in Federated Malay States, *post* p. 327.

[19] Eng. 1875, ss. 33, 38; I. 1891, ss. 36 (1), 53; On. 1914, ss. 45, 52.

[20] *Re Lord and Ellis* (1914) 30 O. L. R. 582; *Macdonald (John) & Co. v. Tew* (1914) 32 O. L. R. 262.

[21] Eng. 1875, ss. 30-32; 1897, s. 9 (1, 2). On. 1914, ss. 42-44, 94.

[22] Eng. 1875, ss. 35, 39; 1903-8 Rules, rr. 132, 140-142. On. 1914, ss. 49-51, 53.

[23] I. 1891, ss. 36, 53

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"full owner," the transfer will "operate as a conveyance by deed" under the Conveyancing Acts, and vest "in the registered transferee an estate in fee simple," subject to registered burdens and burdens that are quasi-incumbrances, but "free from all other rights" including those of the Crown. The statutes which forbid subdivision of holdings do not so override the registration statute as to prevent the registration of a transfer by which an improper subdivision is effected.[24] On registration of a transferee "as limited owner," the "fee simple conferred by the registration shall vest in the transferee and the other persons entitled" under the settlement, the registration otherwise having the same effect as in the case of a "full owner."

Notwithstanding the stringent provision as to the transferee on registration taking "free from all other estates," &c., this does not abrogate the equitable doctrine by which actual notice is under some circumstances treated as amounting to fraud; a registered transferee may thus be liable to have his registration cancelled, if he take with notice of another's claim.[25] But a bonâ fide transferee, duly registered, takes the fee simple or other interest notwithstanding an actual possible defect in his predecessor's title—as by a Crown grant being void, or an executor's power of sale doubtful; he may thus be in a better position than if he had his interest vested in him on initial registration.[26]

The effect of the registration of the transfer of a mortgage or "charge" differs in the three jurisdictions. In England no warranty of title is conferred, though a transferee for value is not affected by any invalidity in the charge of which he was not aware; in Ontario the registered transferee takes "the ownership of the charge free from any unregistered interests"; in Ireland a distinction is made between transfers for and without value, but otherwise on registration of the transferee the instrument of transfer operates as a conveyance by deed under the Conveyancing Acts, and the transferee has "the same title to the charge as the registered transferee of land . . . has to the land."[27] A warranty of title is thus given in Ontario and Ireland, though not in England.[28] But the principles governing the case of a forged transfer being placed on

[24] *In re Geoghegan* [1918] 1 I. R. 188.

[25] *In re Skill and Thompson* (1908) 17 O. L. R. 186. See under "Notice" *ante*, p. 120.

[26] *Farah* v. *Glen Lake Mining Co.* (1908) 17 O. L. R. 13; *Kennedy* v. *Suydam* (1916) 36 O. L. R. 510. See under "Conclusiveness of the Register" *ante*, p. 96.

[27] Eng. 1875, s. 40; I. 1891, s. 41 (4); On. 1914, s. 54 (3). See under "Mortgages" *ante*, p. 195.

[28] *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47, 75, 78.

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the register would probably apply in Ireland and Ontario as in England.[29] On transfer of the mortgage the debt passes to the transferee, and the statutes in effect enable the transferee to sue in his own name for the debt.[30]

The statutes in the following ten jurisdictions are sufficiently alike to be grouped together, viz.: The seven Australian, New Zealand, Trinidad-Tobago, and Jamaica, though each has some points on which it differs from others. Canadian cases will often be found applicable.

A registered owner may transfer his land by executing an instrument in prescribed form, but the land or interest transferred only passes to the transferee upon registration of the instrument: in Queensland and Papua special provision is made for transfer and charge being effected by means of a single instrument.[31] In Queensland, South Australia, and Papua, the transferee has expressly conferred on him (as in Ontario) a "right or claim to the registration of" the interest to be given him, though the case law in other jurisdictions is substantially the same.[32] Some of the statutes have "may," some "shall," in the sections authorizing the statutory method of transfer; the meaning of both is the same, the word "may" being in effect peremptory,[33] and the execution and registration of the statutory instrument being the only method by which the estate of the registered owner can ordinarily be vested in another person.[34] The interest taken by the transferee is the interest that purports to be conferred on him by the instrument of transfer. No words of limitation are used in the statutory forms (with one exception in Queensland and Papua), or contemplated as necessary. In each of the statutes there is however an enactment by which words of inheritance are to be implied under proper circumstances.[35] In Victoria and Western Australia[36] (as in

[29] See *Att.-Gen.* v. *Odell*, *supra*, and under "Forgery" *ante*, p. 143.

[30] See under "Mortgages" *ante*, p. 261.

[31] N. S. W. 1900, ss. 41, 46; Q. 1861, ss. 43, 48, and 1877, ss. 23-28; S. A. 1886, ss. 67, 96; Tas. 1862, ss. 39, 42; V. 1915, ss. 61, 121; W. A. 1893, ss. 58, 82; P. 1913, ss. 28, 34, 59-62; N. Z. 1915, ss. 38, 82; Tr. 1902, ss. 46, 51; J. 1888, ss. 48, 63.

[32] Q. 1877, s. 48; S. A. 1886, s. 246; P. 1913, s. 126; On. 1914, s. 69 (1). *Barry* v. *Heider* (1914) 19 C. L. R. 197, cited under "Unregistered Transactions" *ante*, p. 114, where the effect of the instrument of transfer before registration is dealt with.

[33] *Crowley* v. *Templeton* (1914) 17 C. L. R. 457.

[34] *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575, 579.

[35] N. S. W. 1900, s. 3 (*b*); Q. 1861, s. 3; S. A. 1886, s. 3; Tas. 1862, s. 3; V. 1915, s. 86; W. A. 1893, s. 81; P. 1913, s. 5; N. Z. 1915, s. 222; Tr. 1902, s. 2; J. 1888, s. 69.

[36] V. 1915, s. 124; W. A. 1893, s. 85; On. 1914, s. 102. *Miller* v. *Commr. for Rys.* (1900) 2 W. A. R. 38, 40.

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Ontario) the statutory transfer is of the same efficacy as if under seal, and in other jurisdictions (except Jamaica) it has the efficacy of a deed when registered.[37] And although there is no actual conveyance of the land until registration, the instrument of transfer itself is for many purposes treated as if it were an effective conveyance.[38] The only exceptions to the rule that instruments of transfer need not be under seal, and need not contain words of limitation (as "heirs," &c.), appear to be in Queensland and Papua, where the prescribed forms of combined transfer and charge are framed like ordinary deeds and intended to be executed as such.[39]

The statutes authorize the registered owner to create or transfer easements by the prescribed forms of transfer of land, and in some jurisdictions a short form of words is given for creating an easement.[40] Nor is it only easements proper that can be entered on the register; even agreements to operate in futuro, such as for access of light to buildings "to be erected" have been allowed registration.[41] It is no objection to the registrability of an easement that it is appurtenant to a piece of land of merely nominal size and value—as one square link.[42] An easement must be created in some manner pointed out by the statutes, or otherwise sufficient under the general law. It would seem not to be sufficient to mark out land on a plan as subject to a right of way, or to a restrictive covenant, &c.[43]

The registered owner is also authorized to modify the prescribed forms of transfer, and transfer to himself jointly with another, create (except in Queensland) remainders and other estates, and (except in Queensland, South Australia, and Papua) create and execute powers of appointment, without resorting to the device of

[37] N. S. W. 1900, s. 36; Q. 1861, s. 35; S. A. 1886, s. 57; Tas. 1862, s. 35; P. 1913, s. 24; N. Z. 1915, s. 35; Tr. 1902, s. 41. See under "Mortgages" *ante*, p. 235. Jamaica, in this respect, resembles Manitoba, &c. (*post*).

[38] Aust. Torr. Syst. 907 *et seq.* Other stamp cases are: *Rosehill Racecourse Co.* v. *Commr. of Stamp Duties* (1905) 3 C. L. R. 393; *Tooth & Co.* v. *Commr. of Stamp Duties* (1909) 9 S. R. (N. S. W.) 652.

[39] Q. 1877, s. 24, sch. T; P. 1913, s. 60, sch. 7. Illustrations are: *South Australian Mining Co.* v. *McInnes* (1896) 6 Q. L. J. 289; *Broadfoot* v. *Foxwell* (1896) 7 Q. L. J. 4.

[40] N. S. W. 1900, s. 46; Q. 1877, s. 24; S. A. 1886, ss. 84, 89, 96; Tas. 1862, s. 42, and 1886, s. 27; V. 1915, s. 128; W. A. 1893, s. 65; P. 1913, s. 60; N. Z. 1915, s. 82; Tr. 1902, s. 51; J. 1888, s. 68.

[41] *Commonwealth* v. *Registrar of Titles* (1918) 24 C. L. R. 348.

[42] *Ex p. Waddington* [1917] V. L. R. 603.

[43] *Sumner* v. *McIntosh* [1918] 2 W. W. R. 293 (Sas.).

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uses or re-assignment.[44] The same interests can in fact be created as could ordinarily be created only with the Statute of Uses, but without calling it in aid. Thus, the common law rule as to a man not being able to convey directly to himself is practically abrogated, and there is no objection to a transfer being made by a registered owner from himself in one capacity to himself in another capacity.[45] Life estates with power of appointment over the fee simple may be created,[46] and such a power will be construed as authorizing a mortgage of the land—although a mortgagee gets only a charge and not a transfer of the fee simple.[47]

In some cases modifications in the form of transfer may be made, which are not contemplated by the statutes but will not make the instrument unregistrable; for instance, though a transfer should not contain express trust limitations, a transfer that does contain these may be registered, but the existence of the trusts will not be referred to on the register itself.[48]

In three jurisdictions—Tasmania, Victoria, Western Australia —a registered owner whose interest is an estate tail is expressly authorized to bar the entail and confer a fee simple on the transferee under the prescribed form of transfer; in Tasmania estates tail in registered land can no longer be created.[49] In Jamaica, apparently, an estate tail cannot be registered as such,[50] and therefore it seems that a transfer conferring an estate tail would not be registered. In Victoria estates tail can no longer be created in any land, registered or unregistered.[51]

Any addition to, or alteration in, the prescribed form of transfer should have reference to the land itself. It has been said that an

[44] N. S. W. 1900, s. 99; Q. 1861, s. 82; S. A. 1886, s. 111; Tas. 1862, s. 86; V. 1915, s. 123; W. A. 1893, s. 84; P. 1913, s. 40; N. Z. 1915, s. 87; Tr. 1902, s. 62; J. 1888, s. 65. And see Aust. Torr. Syst. 874, 890, 926, 940.

[45] *Ex p. Wisewould* (1890) 11 V. L. R. 149; *Hosken* v. *Danaher* [1911] V. L. R. 214. In Manitoba an executor is expressly authorized to transfer to himself, and so is a trustee under a will in British Columbia: M. 1913, s. 87; B. C. 1911, s. 107.

[46] Illustrations are: *Furner* v. *Furner* (1903) 3 S. R. (N. S. W.) 576; *Ex p. Newcastle Build. Co.* (1905) *ib.* 237; *Moir* v. *Loxton* (1913) 13 *ib.* 143; Conv. Prec. 106, 107.

[47] *Ex p. Newcastle Build. Co., supra.*

[48] *Re Allan and O'Connor* [1918] 1 W. W. R. 440—an Alberta case which seems of general application.

[49] Tas. 1886, ss. 5-8; V. 1915, ss. 180, 277; W. A. 1893, ss. 135, 236. And see Aust. Torr. Syst. 869-871; Conv. & Prop. L. 98-106.

[50] *In re Weatherspoon and Baynes' Applicotion* (1908) Jamaica, unreported.

[51] Real Property Act 1915 (No. 2719), ss. 62, 63; *In re Wilson* (1899) 15 V. L. R. 193, 201. These sections are re-enactments of ss. 108, 109 of the 1890 Act (No. 1136); see Aust. Torr. Syst. 575, 870.

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instrument transferring chattels as well as land should not be registered.[52]

The registered owner of a lease, a mortgage, or a charge, may transfer his interest by executing an instrument in prescribed form, which (as in the case of land) only vests the interest transferred upon registration. In New South Wales, Victoria, Western Australia, Trinidad-Tobago, and Jamaica,[53] the authority to transfer is contained in the section that authorizes the transfer of land, and in New South Wales and Trinidad-Tobago the words "lease," &c., are not used, but are included by necessary implication in the general expression "any estate or interest in the land." In Queensland, South Australia, Tasmania, Papua, and New Zealand,[54] the authority to transfer is contained in a separate section of the statute, and "lease, mortgage," &c., are expressly mentioned. The use of the word "may" is not merely permissive, but the execution and registration of the statutory instrument is (as in the case of land) the only method by which the interest of the registered owner can ordinarily be vested in another person.[55]

A mortgagee is expressly authorized under his power of sale to execute necessary transfers to purchasers, and on the registration of the transfer the registered ownership of the land or other interest passes from the mortgagor-owner to the mortgagee's transferee.[56]

Transfer of the registered owner's land or other interest may also be made by registration of a transfer by the sheriff after sale of a debtor's property under a writ of execution.[57] The enactments cited are not quite uniform, and in New Zealand are contained in the Supreme Court Rules and not the registration statutes. The

[52] *Boswell* v. *Reid* [1917] N. Z. R. 225.

[53] N. S. W. 1900, s. 46; V. 1915, s. 121; W. A. 1893, s. 82; Tr. 1902, s. 51; J. 1888, s. 63.

[54] Q. 1861, s. 65; S. A. 1886, s. 150; Tas. 1862, s. 63; P. 1913, s. 37; N. Z. 1915, s. 89.

[55] *Crowley* v. *Templeton* (1914) 17 C. L. R. 457; *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575, 579. And see *ante*, *p.* 314.

[56] N. S. W. 1900, ss. 58, 59; Q. 1861, ss. 57, 58; S. A. 1886, ss. 133, 134, 136; Tas. 1862, ss. 54, 55; V. 1915, ss. 148, 150; W. A. 1893, ss. 108, 110; P. 1913, ss. 48, 50; N. Z. 1915, ss. 103 (sch. 4, cl. 7), 109; Tr. 1902, ss. 75, 77; J. 1888, ss. 81, 83. And see under "Mortgages," *ante*, p. 250.

[57] N. S. W. 1900, s. 105; Q. 1861, s. 91, and 1877, s. 35; S. A. 1886, ss. 105-107; Tas. 1862, s. 94, and 1893, s. 17; V. 1915, s. 178; W. A. 1893, ss. 90, 133, and 1909, s. 14; P. 1913, s. 112; Tr. 1902, s. 93; J. 1888, s. 102. And see Aust. Torr. Syst. 983-988. New Zealand—Judicature Act 1908 (No. 89), ss. 21, 51, sch. 2 (Code of Civil Procedure in the Supreme Court), rr. 314-320, 336-361, 362-382; r. 315 refers to registration of charging orders at registry in cases of registered land.

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principal difference between a transfer by the sheriff and other transfers relates to the effect of the transfer upon unregistered rights of other persons than the purchaser, these rights not being so rigidly excluded or overridden by the sheriff's transfer as in other cases. In Victoria and Western Australia special provision is made for enforcing production of the certificate of title for the purpose of registering a transfer from the sheriff, but this production would be enforced in other jurisdictions as part of the machinery of registration.[58]

In several jurisdictions provision is made for transfer of land and other interests by persons who are not registered owners, in addition to transfer by mortgagees and sheriff. In South Australia transfer or sale of land for overdue rates may be made, and the effect of a transfer is given to a deed poll vesting land in promoters under the Land Clauses Consolidation Act.[59] Sale for overdue rates and transfer of the land to a purchaser is sometimes provided for in other than registration statutes, and instruments in other than statutory form are sometimes made registrable as transfers; the statutory provisions for production of certificate of title, &c., on presentation for registration, apply in such circumstances as in case of ordinary transfer.[60] In Tasmania an executor who is not a devisee may be registered as having the right to transfer or mortgage the land.[61] In Victoria and Western Australia transfer of the land of a friendly society may be made by the trustees for the time being, though they may not be the registered owners.[62] Sometimes the effect of a transfer is given to Gazette notification of compulsory acquisition—or "resumption"—of land for public purposes.[63]

Provision is made in the statutes for the use of plans or maps in connexion with the proper description of the land and its boun-

[58] V. 1915, ss. 83, 84; W. A. 1893, ss. 78, 79; *In re Hodgson* (1899) 25 V. L. R. 355. And see *Registrar-General* v. *Wright* (1917) 23 C. L. R. 214; *Anthony* v. *Speed* [1917] S. A. R. 110.

[59] S. A. 1886, ss. 102-104, 113-115.

[60] Queensland—Local Authorities Act 1902 (No. 19), ss. 243-249; *In re Church's Caveat* [1905] S. R. Q. 201; Fowles & Douglas Local Govt. Law, 358. Western Australia—Municipal Institutions Act 1900 (No. 8), ss. 358, 359; *Stone and Haselden* v. *Registrar of Titles* (1902) 4 W. A. R. 89; *Watson* v. *Registrar of Titles* (1904) 7 W. A. R. 45. Whether the transferee takes the unincumbered ownership, or whether he takes subject to existing incumbrances, depends on the construction of the particular statute: see *Stone and Haselden* v. *Registrar of Titles, supra; Ex p. Geraldton Municipality* (1905) 7 W. A. R. 259.

[61] Tas. 1878, s. 1. [62] V. 1915, s. 130; W. A. 1893, s. 89.

[63] Aust. Torr. Syst. 108, 264, 281; *Tully* v. *Carterton (Borough)* (1905) 25 N. Z. R. 236. Commonwealth—Lands Acquisition Act (1906 (No. 13), s. 20; *Commonwealth* v. *Registrar of Titles* (1918) 24 C. L. R. 348.

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daries. In particular, plans are deposited at the registry when selling land in allotments is contemplated, and the description of each piece sold, for the purpose of registration of transfers on sale, is thus much facilitated.[64] Reference to the number of an allotment on a deposited plan is usually sufficient description of the parcels in a transfer, and in some jurisdictions—as Victoria, Western Australia, New Zealand[65]—this is expressly enacted. The plan referred to is in fact embodied in and becomes part of the register, and the registered owner may be entitled to rely upon the plan as warranting the correctness of his boundaries, even when a mistake in the plan has been made.[66]

Registration of a transfer has sometimes been refused when, owing to the absence of a complete description by reference to a deposited plan, the actual description of the parcels has been ambiguous.[67] A plan is usually intended only to furnish a description of the land, and it cannot be treated as a document of title merely by writing words on it purporting to create a building restriction; such a restriction should be created by an instrument of transfer, though if properly created the plan might be sufficient notice of it.[68]

The effect of depositing a plan with roads marked upon it varies in different jurisdictions. In many such a deposit may be sufficient evidence of intention to dedicate the roads to public use;[69] though it would seem necessary, in order to create rights of way appurtenant to the abutting lands, to state this expressly in the transfer of those lands. In New Zealand the deposit of a subdivision plan does not operate as a dedication of roads to the public, but does create a right of way appurtenant to abutting and other lands in the subdivision.[70]

The method of registering the ownership of the transferee consists in registering or recording the instrument of transfer, and

[64] N. S. W. 1900, ss. 113, 114; Q. 1861, ss. 119, 120, and 1885, s. 8; S. A. 1886, ss. 241, 242, 252-254; Tas. 1862, ss. 103, 104; V. 1915, ss. 201-214; W. A. 1893, ss. 151-169; P. 1913, ss. 120, 121; N. Z. 1915, ss. 178, 179; Tr. 1902, sch. 2; J. 1888, s. 126. And see Aust. Torr. Syst. 906.

[65] V. 1915, s. 212; W. A. 1893, s. 167; N. Z. 1915, s. 179.

[66] *Smith* v. *Saskatoon* (*City*) (1912) 21 West. R. 868 (Sas.). See *Turner* v. *Myerson* (1918) 18 S. R. (N. S. W.) 133, as to effect of long possession under description by reference to deposited plan. In the latter case evidence was admitted to shew mistake in the plan; in the former the evidence was held inadmissible.

[67] *Rainford* v. *Registrar of Titles* (1910) Jamaica, unreported; *Smith* v. *Registrar of Titles*, *ib.*

[68] *Sumner* v. *McIntosh* [1918] 2 W. W. R. 293 (Sas.), quoting Aust. Torr. Syst. 763.

[69] *Born* v. *Huntley* (1886) 20 S. A. R. 33; Aust. Torr. Syst. 818.

[70] N. Z. 1915, s. 179.

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entering a note of the transaction on the folium or page of the register on which the transferor's title is shewn. When part only of the land comprised in one folium of the register—usually referred to in the statutes as a "certificate of title"—is transferred, the transferee is registered on a new folium or page of the register, and this is often spoken of as issuing to him a new certificate of title. In either case the registration carries with it all the benefits of the statutory warranty of title, the transferee being then registered owner of the land or interest as shewn on the register. When the whole of the land in one folium is transferred and the transferee merely has the fact of the transfer noted on the transferor's folium, he will receive the transferor's certificate of title as his own. In four jurisdictions — Victoria, Western Australia, New Zealand, Trinidad-Tobago,[71]—it is enacted that the transferor's folium of the register endorsed with a note of the transfer is to be as effectual for evidencing the transferee's title as if the transferee were registered in his own name on a new folium. In the remaining six—New South Wales, Queensland, South Australia, Tasmania, Papua, Jamaica,[72]—this enactment is wanting; but it has been decided in New South Wales that the want is supplied by the section which enacts that a transferee takes the estate and privileges of the transferor.[73] The decision applies exactly to the Jamaica statute, and would seem to apply also in Queensland, South Australia, Tasmania, and Papua, notwithstanding that in each of these jurisdictions the section referred to deals primarily with transfers of mortgage, &c. Even apart from their particular enactment, the intention seems to be that a transferee, however registered, should have the same right in all respects as his transferor had.[74]

The method of registering a transferee who takes an estate in remainder or reversion is left indeterminate in most jurisdictions, and apparently, except in New Zealand, the registration may—as is expressly provided in South Australia and Tasmania [75]—be made either on the same folium of the register as the tenant for life, or

[71] V. 1915, ss. 125, 126; W. A. 1893, ss. 86, 87; N. Z. 1915, ss. 83-86; Tr. 1902, ss. 54-58.

[72] N. S. W. 1900, ss. 48, 51; Q. 1861, ss. 49, 50, 65, and 1877, s. 17; S. A. 1886, ss. 98-100, 150; Tas. 1862, ss. 44, 45, 63, and 1886, ss. 12, 13; P. 1913, ss. 35-37; J. 1888, ss. 63, 66.

[73] *Phillips* v. *McLachlan* (1884) 5 N. S. W. 168, 174.

[74] See *Phillips* v. *McLachlan, supra; Port Swettenham Rubber Co.* v. *Loke Yew* (1910) Innes F. M. S. at p. 251. This point was not dealt with in the Privy Council judgment ([1913] A. C. 491), but any doubt was removed by the passing of an amending statute.

[75] S. A. 1886, ss. 73, 75, 188. Tas. 1862, ss. 88, 89; 1886, s. 16.

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on a fresh folium. The practical result of the remainderman being registered on the tenant for life's folium will be that no separate duplicate or certificate of title will be issued to the remainderman. In New Zealand only the tenant for life can receive a duplicate certificate of title, and the proper course is for the title of the remainderman to be stated in the body of the registered folium or certificate of title, and not be merely noted by way of endorsement.[76] This would seem to be the proper course also in other jurisdictions—New South Wales, Queensland, Victoria, Western Australia, Papua, Trinidad-Tobago, Jamaica [77]—if registration is not made on a separate folium. But by whatever method a remainderman may be registered, he must be registered afresh as owner of the fee simple when his remainder falls into possession.[78]

Ordinarily the production at the registry of the certificate of title is as essential upon registration of a transfer of mortgage, lease, &c., as upon transfer of the land itself (*ante,* p. 318). In Victoria,[79] apparently with the object of avoiding the necessity for this production, the entry of the transfer may be made on the mortgage, &c., itself—that is, on the copy filed in the registry in case of execution in duplicate—instead of on the folium of the register continuing the title to the land.

With respect to the effect of the duly executed instrument of transfer being registered, in these jurisdictions—differing from England, Ireland, and Ontario—the transferee is not on registration given a fee simple, leasehold estate, &c., in so many words, but he receives the interest which his transferor the then registered owner had, so far as such interest purports to be given him by the instrument of transfer. This is done by a group of sections which enact substantially as follows: (1) No interest passes by the instrument itself until registration, but on registration the interest specified in the instrument does pass; (2) The transferee is then in the same position as the previous registered owner with regard to the estate vested and the title warranted; (3) If the interest transferred is a mortgage, lease, &c., the right to sue for the debt, &c., passes to the transferee. In South Australia, Victoria, Western Australia, and Jamaica,[80] it is expressly enacted that the trans-

[76] N. Z. 1915, ss. 61, 87; *Ex p. Matheson* (1914 33 N. Z. R. 838. This is also the practice in Trinidad-Tobago.

[77] N. S. W. 1900, ss. 101, 102; Q. 1861, ss. 36-39; V. 1915, s. 266; W. A. 1893, s. 221; P. 1913, ss. 109, 110; Tr. 1902, s. 65; J. 1888, s. 60.

[78] See preceding note; Aust. Torr. Syst. 874, 926, 1002.

[79] V. 1915, s. 52.

[80] S. A. 1886, ss. 67-70, 151; V. 1915, ss. 61, 72, 121, 122, 269; W. A. 1893, ss. 58, 68, 82, 83, 228; J. 1888, ss. 48, 55, 63, 64, 106. The special sections referred to are: S. A. 68; V. 121, 269; W. A. 82, 228; J. 63, 106.

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feree becomes the owner of the interest transferred, and in the three latter that every owner and transferee has, whilst registered, the same rights and liabilities as if he had been the original owner;[81] these enactments however seem to be implied in the other six jurisdictions—New South Wales, Queensland, Tasmania, Papua, New Zealand, Trinidad-Tobago.[82] But on transfer of a lease the transferee does not become liable for breaches of covenants or conditions in the lease committed after he has again transferred to another person.[83] The statutes in South Australia, Victoria, Western Australia, New Zealand, and Jamaica[84] also enact, with respect to transfers of lease, that in such a transfer there is implied a covenant by the transferee with the transferor to keep the latter indemnified against the rent and covenants under the lease. Such a covenant, however, would seem to be implied without any special enactment to that effect.

The transferee thus gets the same warranty of title as any other registered owner—on initial registration or otherwise—and the register is as conclusive in his favour. No distinction is drawn in these groups of sections between voluntary and for value transactions, as regards the conclusiveness of the register, though the distinction is referred to in other parts of the statutes and is upheld by judicial decision.[85] Nor is any such distinction here drawn between registration after transfer and initial registration, though this distinction also is referred to elsewhere.[86]

Other questions on the conclusiveness of the register, and the exceptions to this conclusiveness, are on the same footing as questions relating to the title of registered owners in general (*ante*, p. 94). The transferee, by being registered as owner, acquires a legal and warranted title to the interest in respect of which he is registered,[87] subject to the same exceptions as other registered owners. He takes, of course, subject to registered incumbrances, and

[81] See *Stevenson* v. *Brind* (1895) 21 V. L. R. 109.

[82] N. S. W. 1900, ss. 41, 42, 51, 52; Q. 1861, ss. 43, 44, 65, 66; Tas. 1862, ss. 39, 40, 63, 64; P. 1913, ss. 28, 29, 37, 38; N. Z. 1915, ss. 38, 58, 89, 90; Tr. 1902, ss. 46, 47, 60, 61.

[83] *Wilson* v. *Brightling* (1885) 4 N. Z. C. A. 4; the enactment there referred to is now contained in N. Z. 1915, ss. 89, 90.

[84] S. A. 1886, s. 152; V. 1915, s. 135; W. A. 1893, s. 95; N. Z. 1915, s. 91; J. 1888, s. 74.

[85] See under "Voluntary Transactions," *ante*, p. 106; Aust. Torr. Syst. 833, 835; Q. 1861, s. 109; P. 1913, s. 30.

[86] See under "Conclusiveness of Register," "Forged and Invalid Instruments," *ante*, pp. 97, 143; Aust. Torr. Syst. 825-828, and suppl. Addendum; *Assets Co.* v. *Mere Roihi* [1905] A. C. 176.

[87] *Wells* v. *District Land Registrar* (1901) 21 N. Z. R. 215; *West* v. *Read* (1913) 13 S. R. (N. S. W.) 575.

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transfer of land subject to mortgage has already been referred to under "Mortgages" *ante*, p. 270.

The transferee, when registered, will get the benefit of any appurtenant rights that belonged to his predecessor. Thus, the right to receive water by a pipe line laid across adjoining land will, if once appurtenant to a piece of land, pass to the transferee.[88] But it is possible that an implied easement might not pass by a transfer of registered land, under circumstances in which it would have passed had the land not been on the register.[89]

The transferee will not, under the enactments that vest in him rights of action, be entitled to sue a lessee of his transferor for breach of covenant already complete before the registration of the transferee as owner.[90]

The remaining seven jurisdictions are: Fiji, Federated Malay States, Manitoba, Saskatchewan, Alberta, North-West Territories, Leeward Islands. Though varying in language, enactments in all the statutes agree substantially in authorizing a registered owner to transfer his land by the only method permitted—execution and registration of an instrument in prescribed form; the land passes only on registration of the instrument.[91] In Federated Malay States non-statutory methods of transfer are expressly prohibited (s. 5), and in Leeward Islands any such method operates to confer contractual rights only (s. 6). In Manitoba the instrument itself, unregistered, confers only a right to registration, but on registration becomes embodied in and part of the register (ss. 89, 98). In Manitoba (s. 91), Alberta (s. 46), and North-West Territories (s. 70), the unregistered transfer is only inoperative "as against any bonâ fide transferee," and in Saskatchewan is not inoperative "as against the person making the same" (s. 58). The differences between these various enactments and the corresponding enactments in the other ten jurisdictions (New South Wales, &c., *ante*, p. 314), seem very slight for practical purposes, and there seems to be no reported case in which any such differences have been regarded as important, a case on mortgages is cited *ante*, p. 117, note 28. In Fiji, Federated Malay States, and Leeward Islands, there is no enactment on the subject of words of limitation, but in Manitoba, Saskatchewan, Alberta, and North-West Territories,[92] words of

[88] *Taylor* v. *Browning* (1885) 11 V. L. R. 158.

[89] See *Nelson* v. *Walker* (1910) 10 C. L. R. 560, 573, 593.

[90] *Measures* v. *McFadyen* (1910) 11 C. L. R. 723.

[91] Fi. 1876 (1906), ss. 39, 41; F. M. S. 1911, ss. 5, 25, 29; M. 1913, ss. 86, 88, 89, 91, 98; Sas. 1917, ss. 58, 74, 75; Al. 1906, ss. 41, 46, 48; Can. 1906, ss. 70, 71, 76, 78, 79; L. Is. 1886 (1914), ss. 6, 20.

[92] M. 1913, s. 88; Sas. 1917, s. 75; Can. 1906, s. 79; Alberta—Transfer and Descent of Land Act (1906, c. 19), s. 3. Can. Torr. Syst. 229, 230.

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limitation are expressly made unnecessary, though in Alberta the enactment is not contained in the registration statute. In no one of these seven jurisdictions is the statutory instrument made, or given the operation of, a deed.[93]

In Fiji, Saskatchewan, Alberta, and North-West Territories,[94] the enactments authorizing transfer of the land also authorize the transfer or creation of an easement by means of the statutory instrument of transfer. A reservation of mines may be made, and in Fiji a short form of words having statutory effect may be inserted in the transfer for that purpose.[95] Only in Fiji is any express provision made for creating a registered life estate by transfer, and even this is to be registered as an incumbrance on the fee simple.[96] It may be however that in Manitoba and Saskatchewan, and more especially in Alberta and North-West Territories,[97] there is implied permission given by the statutes to create registered life estates, since these can be made the subject of initial applications. In Manitoba the registered owner may transfer to himself jointly with another, and "an executor or administrator may make a valid transfer to himself individually"; but such transfers appear to be valid in other jurisdictions where there is no such express authorization.[98]

In Fiji, Saskatchewan, Alberta, and North-West Territories,[99] estates tail are abrogated by enactments which forbid their creation for the future; the enactment in Alberta is not contained in the registration statute.

In Saskatchewan a transfer to two persons beneficially will be construed on the presumption that they take as tenants in common and not as joint tenants.[1] In Saskatchewan, Alberta, and North-West Territories,[2] on a transfer to a man and his wife the transferees will not take by entireties unless so expressed in the transfer, and husband and wife may transfer to each other; these enactments are merely the application to registered land of the new rule of law introduced by the Married Women's Property Acts.[3]

[93] As to Manitoba, &c., see Can. Torr. Syst. 234.

[94] Fi. 1876 (1906), s. 41; Sas. 1917, s. 74; Al. 1906, s. 48; Can. 1906, s. 78. And see Can. Torr. Syst. 233.

[95] Fi. 1876 (1906), s. 118. [96] Fi. 1876 (1906), ss. 18, 19.

[97] M. 1913, s. 28; Sas. 1917, s. 31; Al. 1906, ss. 26 (5), 27; Can. 1906, ss. 54, 55.

[98] M. 1913, s. 87. *Re Lockhart* (1912) 20 West. R. 413 (Sas.); Can. Torr. Syst. 255; *Hosken* v. *Danaher* [1911] V. L. R. 214 *ante*, p. 316.

[99] Fi. 1876 (1906), s. 15; Sas. 1917, ss. 198, 199; Can. 1906, s. 7; Alberta—Transfer and Descent of Land Act (1906, c. 19), s. 9.

[1] Sas. 1917, s. 197.

[2] Sas. 1917, ss. 200, 201; Can. 1906, ss. 14, 15; Alberta—1906, c. 19, ss. 7, 8. [3] See *Fraser* v. *Douglas* (1908) 40 Can. S. C. R. 384.

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Registered leases, mortgages, and charges may be transferred in the same way as land, though in Manitoba there seems to be no express provision for transfer of a lease; on registration the transferee takes the rights and liabilities of his transferor.[4] In Manitoba, Saskatchewan, Alberta, and North-West Territories, part of a mortgage may also be transferred.

Provision is made (except in North-West Territories) for transfer of mortgaged land to a purchaser on realization of the security by sale. In Fiji and Federated Malay States the certificate of the officer of the court who conducts the sale is treated as a transfer of the land, and on its production the purchaser is registered as owner; in Leeward Islands the court makes an order for registration of the purchaser and he is registered as owner accordingly.[5] In Manitoba, Saskatchewan, and Alberta,[6] the mortgagee is authorized to execute the necessary instrument on sale of the land, and on registration of this instrument or transfer the interest of the owner-mortgagor passes to the purchaser. In North-West Territories no provision is made for sale or transfer by a mortgagee, but he must seek the aid of the court.[7]

Except in Manitoba, provision is made for transfer of land or interests therein on sale under execution or order of court. In Manitoba a registered judgment merely creates a lien, to enforce which proceedings outside the registration statutes have to be taken.[8] In Fiji, Federated Malay States, and Leeward Islands,[9] the transfer to the purchaser is signed by the proper judicial officer, and when registered the interest of the debtor vests in the transferee as in the Australian jurisdictions (*ante,* p. 317). In Saskatchewan, Alberta, and North-West Territories,[10] a similar transfer to the purchaser is made, but it must be confirmed by judge's order, and is only registered after an interval of four weeks from time of production at the registry. In Manitoba, Saskatchewan, Alberta, and North-West Territories[11] special provision is made

[4] Fi. 1876 (1906), ss. 46, 47; F. M. S. 1911, ss. 33, 34; M. 1913, ss. 109, 110; Sas. 1917, ss. 122-124; Al. 1906, ss. 66, 67; Can. 1906, ss. 104-106; L. Is. 1886 (1914), ss. 64, 68.

[5] Fi. 1876 (1906), s. 67; F. M. S. 1911, s. 50; L. Is. 1886 (1914), s. 82.

[6] M. 1913, ss. 120, 121; Sas. 1917, ss. 110, 111; Al. 1906, s. 62A (7, 9).

[7] Can. 1906, s. 99. See under "Mortgages," *ante,* p. 252.

[8] Manitoba—Judgments Act (R. S. 1913, c. 107); Can. Torr. Syst. 256.

[9] Fi. 1876 (1906), s. 91; F. M. S. 1911, s. 68; L. Is. 1886 (1914), s. 108.

[10] Sas. 1917, ss. 151-153; Al. 1906, ss. 79-81; Can. 1906, ss. 127-129. Can. Torr. Syst. 257.

[11] M. 1913, ss. 50-52; Sas. 1917, ss. 152, 154-156; Al. 1906, ss. 80, 82; Can. 1906, ss. 128, 130. Can. Torr. Syst. 255. As to Ontario, *ante,* p. 310.

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for registration of transfers of land on sale for arrears of taxes, and the procedure in the three latter resembles that on sale under execution.

Plans form the subject of enactments in all these statutes. But in Fiji and Federated Malay States a plan is only required to be deposited at the registry upon the subdivision of land "for the purpose of selling the same in allotments as a township," and in Leeward Islands such deposit is only required at the discretion of the registrar.[12] The provisions in Manitoba, Saskatchewan, Alberta, and North-West Territories[13] are much more elaborate. In Manitoba a sale of land by reference to a plan, if made before the plan has been registered, is voidable at the option of the purchaser,[14] and this option may be exercised even after taking possession.[15] In Alberta such a sale is prohibited and illegal, though the illegality cannot be relied on if the plan has been registered at the time of commencement of proceedings to enforce or set aside the sale; a purchaser entitled to rely on the illegality of the sale can (if he was not aware of the non-registration of the plan) recover back his purchase money from his vendor.[16] The registration of a plan operates, in Manitoba, as a dedication of the roads on it to the public use, and in Saskatchewan and Alberta such roads, &c., vest in the Crown.[17] The plan becomes in effect part of the register; but it cannot be used as an independent document by which to create a private right in the nature of an easement.[18]

The method of registering the transferee as owner in Fiji and Federated Malay States may vary, as in the Australian jurisdictions (*ante*, p. 319), according as the whole or part only of the land comprised in one certificate of title or folium of the register is transferred.[19] If only part be transferred, the transferee receives a new certificate of title as a matter of course, and is thus registered on a separate folium; if the transferee takes the whole, he may (at his own option) be registered on his transferor's folium,

[12] Fi. 1876 (1906), s. 113; F. M. S. 1911, s. 84; L. Is. 1886 (1914), s. 145.

[13] M. 1913, ss. 62-71; Sas. 1917, ss. 79-91; Al. 1906, ss. 53-53B, 124-130; Can. 1906, ss. 83-87.

[14] M. 1913, s. 64. So in British Columbia: B. C. 1911, s. 94.

[15] *Chauncy* v. *Palmer* (1916) 34 West. R. 978 (B. C.).

[16] Al. 1906, s. 124 (7, 8A); *Boulevard Heights* v. *Veilleux* (1915) 52 Can. S. C. R. 185.

[17] M. 1913, s. 62; Sas. 1917, ss. 88, 89; Al. 1906, s. 126.

[18] *Smith* v. *Saskatoon (City)* (1912) 21 West. R. 868 (Sas.); *Sumner* v. *McIntosh* [1918] 2 W. W. R. 293 (Sas.). For other cases applicable, see *ante*, p. 319, as to Australian jurisdictions.

[19] Fi. 1876 (1906), ss. 43, 44; F. M. S. 1911, ss. 30, 31.

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and will simply receive the latter's certificate of title with a note of the transfer endorsed. In the Fiji statute nothing is said about the effect of this registration of the transferee on the former owner's folium of the register, nor is there any such precise statement as in the New South Wales statute as to the rights and privileges of the transferor passing to the transferee "upon the registration of any transfer."[20] The New South Wales case cited will not therefore apply, but the general intention of the Fiji statute appears to be that the transferee, however registered, should have the same warranty of title as the transferor had whilst registered as owner.[21] The Federated Malay States principal statute resembles the Fiji statute on the method of registration, but any doubt as to the effect of the registration of a transferee on the former owner's folium has been set at rest by an amendment,[22] and the transferee now has the same warranty, however registered, as if he were registered on a new folium and had received a certificate of title in his own name.

In Manitoba the only method of registration expressly mentioned by the statutes seems to be the recording of the instrument of transfer, and upon registration the instrument becomes part of the register and creates or transfers the interest mentioned in the instrument; it is however implied that registration on a new folium must take place, since on transfer the certificate of title is "delivered up for cancellation in whole or in part," though nothing is said about the transferee receiving a new certificate of title.[23] No provision is made for the transferee being placed in the same position by being registered on his transferor's folium as if he were registered on a new folium and received a certificate of title in his own name.

In Saskatchewan, Alberta, North-West Territories, and Leeward Islands,[24] only one method of registration on transfer is referred

[20] N. S. W. 1900, s. 51; *Phillips* v. *McLachlan* (1884) 5 N. S. W. 168; *ante*, p. 320. With the New South Wales and other Australian sections contrast Fi. 1876 (1906), s. 47, which merely refers to "any transfer of any mortgage," &c.

[21] See *Phillips* v. *McLachlan*, *supra*, and *Port Swettenham Rubber Co.* v. *Loke Yew* (1910) Innes F. M. S. at p. 251; note 74 *ante*, *p.* 320. The Malay decision will apply to the Fiji statute.

[22] F. M. S. 1913, s. 2, adding a clause to F. M. S. 1911, s. 30. This amending statute was evidently passed in view of the doubt raised by the conflict of judicial opinion in *Port Swettenham Rubber Co.* v. *Loke Yew*, *supra*.

[23] M. 1913, ss. 86, 89. It is said in Can. Torr. Syst. 59 that a certificate of title is issued "upon each subsequent transfer," but the section cited (s. 66, now M. 1913, s. 73) does not refer to this.

[24] Sas. 1917, ss. 77, 78; Al. 1906, ss. 37, 50, 51; Can. 1906, ss. 81, 82; L.Is. 1886 (1914), ss. 21, 23.

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to; the transferee is registered on a new folium, receiving a certificate of title in his own name, and nothing is said about his taking his transferor's certificate of title.

No provision is made in these jurisdictions for registering life estates or estates in remainder or reversion, in cases where these are created by the statutory transfer, except in Fiji; and only in Fiji is such creation expressly sanctioned or referred to (*ante*, p. 324).

The effect of the registration of the transfer in Fiji and Federated Malay States [25] is that the land or interest specified in the instrument passes to the transferee; in the case of land the title of the transferee is—in Fiji at any rate where registration on a new folium is made—warranted expressly, and in the case of a mortgage, a charge, or a lease, the sight to sue in his own name (as in the Australian jurisdictions) also passes to the transferee. In each case the transferee is thus placed in the same position as his transferor, and his estate and rights are governed by the provisions relating generally to owners of registered interests.

In Manitoba, Saskatchewan, Alberta, and North-West Territories [26] the transfer on registration operates to pass the interest specified in the instrument, even (in the case of land) against another bonâ fide transferee, though this reference to "bonâ fide transferee" is now omitted in the Saskatchewan statute (s. 58); in the case of a mortgage, a charge, or a lease, the right to sue also passes, as in the Australian jurisdictions. The transferee of land, by being in effect registered afresh, has the same statutory rights as other registered owners, and this also seems to be the case with regard to transferees of other interests. In Manitoba it is enacted that the transferee takes any rights enjoyed by his transferor under a party wall agreement (s. 96). Appurtenant rights generally in these jurisdictions will pass as in Australia (*ante*, p. 323).

In Leeward Islands the transferee of land is treated on registration as a new owner, and in the case of mortgages, &c., will "enter into the whole rights of the transferor." [27]

Although the title of the transferee under a statutory transfer is not complete until registration, yet if the transfer is made by way of gift from the registered owner to the transferee, the gift is complete on the execution of the transfer and delivery to the

[25] Fi. 1876 (1906), ss. 14, 39, 47, 48; F. M. S. 1911, ss. 8, 25, 34, 35; 1913, s. 2.

[26] M. 1913, ss. 88, 89, 91, 96, 110, 111; Sas. 1917, ss. 58, 75, 124; Al. 1906, ss. 41, 46, 67, 68, and 1906, c. 19, s. 3; Can. 1906, ss. 70, 71, 76, 79, 106, 107. Sect. 67 of Sas. 1909 is not reproduced in the present statute.

[27] L. Is. 1886 (1914), ss. 21, 22, 66, 68, 69.

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donee, since what remains to be done—the registration—can be done by the donee-transferee himself.[28]

SUB-SECTION 3—TRANSFER IN BRITISH COLUMBIA AND BRITISH HONDURAS.

In British Columbia and British Honduras no prescribed form of instrument of transfer is made compulsory, although in each a statutory form of transfer is optional as an alternative to an ordinary deed of conveyance. The statutory provisions of the two jurisdictions on this subject have little else in common, and must be dealt with separately.

BRITISH COLUMBIA.

The scheme of the statutes is that the sale of an interest in registered land may be completed either by an ordinary deed of conveyance or assignment, or by an instrument in a special statutory form; in either case the document need not (except when executed by a corporation) be under seal, but must in all cases be attested, and must be registered in order to pass the interest purporting to be conveyed or assigned.[1] Thus, notwithstanding the absence of the enactments making the use of a prescribed form of transfer compulsory, the formalities to be observed in order to make a transfer or conveyance registrable are as stringent as in other jurisdictions. In one respect, indeed, they are more stringent—with respect to the description of the parcels and the furnishing of plans. The vendor must so describe the property conveyed as to give the purchaser a registrable document, and must furnish any plan required; elaborate provisions are also made with respect to depositing plans on subdivision, &c.; transfer of small pieces of land can sometimes only be made if the title is fully warranted.[2]

The execution, attestation, and registration of instruments is dealt with under "Mortgages" *ante*, p. 276. When once registered the same warranty of title arises, whether the assurance has been made by ordinary conveyance or by means of a transfer in statutory form.[3]

Notwithstanding the stringent provisions as to no interest in land passing until registration, it has been held that an assignment

[28] *Anning* v. *Anning* (1907) 4 C. L. R. 1049, 1057. It is the task of the transferee to effect registration: *Commonwealth* v. *State of New South Wales* (1918) 25 C. L. R. 325; though the transferor is also entitled to do so: *ib.* at pp. 340, 351.

[1] B. C. 1911, ss. 51, 104, 106.

[2] B. C. 1911, ss. 61, 89-101.

[3] *Hudson's Bay Ins. Co.* v. *Creelman* [1919] 3 W. W. R. 9 (Privy Council), where a company, purchasing land ultra vires, was registered with "indefeasible" title.

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of mortgage does not require registration in order to make it valid between the parties, and a further assignment can be registered without the first assignment being registered;[4] but the mortgage was expressly distinguished from "land."

A vendor must also, if the conveyance is not to be completed at once by reason of the purchase money being payable by instalments, deliver to the purchaser a registrable document embodying the contract, and must register his own title so that he can give the purchaser a registered title; moreover, as in Manitoba, a contract or conveyance by reference to an unregistered plan is voidable at the option of the purchaser.[5]

Besides transfers of land and "charges" made by owners, there is also provision for transfers to purchasers under sales for arrears of taxes, and under sales by the sheriff to satisfy the claims of judgment creditors.[6] Special provision is made for a purchaser at a tax sale getting a good title, and for dispensing with the production of the certificate of title in the case of tax and execution sales. When a tax sale purchaser is once on the register of "absolute fees" he can subsequently be registered with "indefeasible" or fully warranted title.[7]

Provision is made for transfer by a registered owner to himself jointly with others, and "a trustee under a will may make a valid transfer to himself individually."[8] Words of limitation are not required in order to confer estates of inheritance, and though "in fee simple," "in tail," &c. may be used, their omission will not prevent the whole interest of the transferor or grantor passing.[9]

The method of registering the transferee of land as owner is by registering him on a new folium; no provision is made for continuing to use the folium and certificate of title of the transferor.[10] In the case of "an assignment of a registered charge," the registration may be effected by substituting on the register the name of the transferee for that of the former owner, the latter's name being simply struck out "in red ink."[11] Instruments, as distinguished from title and persons, are spoken of as being "recorded," and are

[4] *In re Standard Trust Co.* (1916) 22 B. C. R. 538.

[5] B. C. 1911, ss. 61, 94. See M. 1913, s. 64, *ante*, p. 326; *Chauncey* v. *Palmer* (1916) 34 West. R. 978 (B. C.).

[6] B. C. 1911, ss. 36-40, 139.

[7] *Temple* v. *North Vancouver Corp.* (1913) 25 West. R. 245, 350 (B. C.); *Ex p. Lamson* (1915) 21 B. C. R. 507.

[8] B. C. 1911, s. 107. So an executor in Manitoba: see M. 1913, s. 87, and cases *ante*, p. 324.

[9] B. C. 1911, s. 107A.

[10] B. C. 1911, ss. 102, 103.

[11] B. C. 1911, s. 29 (2).

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ected to be transcribed in full in proper books. References to se recorded instruments are made on the register proper or egister books," but such references have not the effect of registion.[12] Life estates and estates in remainder can only be registered as "charges," but these must necessarily appear on the um on which the owner of the fee simple (or it may be fee tail) egistered.[13] So as to sub-surface rights; these, if reserved by a dor, will appear on the purchaser's folium, notwithstanding the hibition against registration of sub-surface rights with indeible title.[14]

Although the statutory form of transfer is not made compul-, it seems to be implied that it is only on the registration of n an instrument that the estate and interest of the transferor nce passes to the transferee; the purchaser taking the ordinary veyance seems to have only the right of applying to be regisd as the owner of the interest conveyed.[15] In the latter case applicant for registration would, when registered, be on the ting of an owner registered on initial registration; in the former interest vesting in the new registered owner would be the interand warranted title of the former owner as modified by the inment of transfer. If the interest transferred be a mortgage, statutory form of transfer vests in the transferee the right to as in other jurisdictions.

The registration statute itself contains an enactment[16] corresponding with the Voluntary Conveyances Act of England and ıy other jurisdictions;[17] in some of these the Acts are expressly le applicable to registered land, but the fully warranted title purchaser would seem, independently of these Acts, to be secure n avoidance by any conveyance of a predecessor in title. The usion in the registration statute itself of the voluntary conance enactment seems to place the matter beyond a doubt in ish Columbia, though it must be remembered that the statute tes to the registration of instruments affecting both registered unregistered land.

Provision is made, as in some Australian statutes, for compelproduction of the certificate of title, when this is in the hands

[12] B. C. 1911, ss. 143, 144.
[13] B. C. 1911, s. 53.
[14] *Albernin Land Co.* v. *Registrar-General* [1918] 2 W. W. R. 537 C.); B. C. 1911, s. 17.
[15] B. C. 1911, ss. 102, 104, 106.
[16] B. C. 1911, s. 141.
[17] See Own. & Inc. 229; Aust. Torr. Syst. 835; *ante*, p. 110.

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of a mortgagee and the owner wishes to effect registration of an interest subject to the mortgage.[18]

BRITISH HONDURAS.

The British Honduras statute contains little relating to transactions with land when once on the register. The register is made the foundation of all legal title to the land, equitable interests being protected by caveat only; a transfer, registered, is a sufficient conveyance—though no form of transfer is prescribed—and the transferee when registered takes free of any unregistered incumbrance.[19]

SECTION 2—LEASES.

SUB-SECTION 1—ENGLAND, IRELAND, ONTARIO, BRITISH COLUMBIA, BRITISH HONDURAS.

In the five jurisdictions above-mentioned no provision is made for a lease being in prescribed form, and only in Ireland and British Columbia [1] is express provision made for registration of leases. In England and Ontario [2] only notice, and not the lease itself, is registered. These observations are not concerned with registered "leasehold land" in England, Ireland, or Ontario, where the owner is registered in the same way as owners of freehold land.

In British Honduras no special provision at all is made with respect to leases, and they are only once mentioned in the registration statute.[3]

Other enactments in the statutes of England, Ireland, Ontario, and British Columbia [4] relate only to the removal from the register of leases no longer operative, and to the validity of certain occupation leases as against the registered title. The latter subject is dealt with under "Possession," *ante*, p. 90.

In Ireland the registration of a lease is merely the registration of a burden, conferring priority according to priority of registration but in itself carrying no warranty of title.[5] No special mode of execution appears to be required, as is required in the case of transfers and charges.

[18] B. C. 1911, ss. 87, 88. [19] B. H. 1914, ss. 30, 31, sch. D r. 12.

[1] I. 1891, s. 47; B. C. 1911, ss. 20A, 29 (1).

[2] Eng. 1875, ss. 50, 51; 1903-8 Rules, rr. 201-206. On. 1914, s. 70. Own. & Inc. 125-128. [3] B. H. 1914, s. 15.

[4] Eng. 1875, ss. 18 (7), 20; 1903-8 Rules, rr. 218-222. I. 1891, s. 45. On. 1914, s. 24 (*d*). B. C. 1911, ss. 22 (1) (*d*), 29 (1), 104-106, 149, 150.

[5] I. 1891, ss. 44, 45, 46, 49.

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In British Columbia a lease is registrable as a "charge" (in the wide sense given to the word in the registration statute), and requires to be executed in the same manner as other registrable instruments.[6] Although, except for short occupation leases, registration is essential in order to pass any interest in the land to the lessee, the registration only confers the limited warranty of title that is conferred by the registration of any other charge.[7] A lease cannot be registered as a charge unless the lessor is registered as owner, though this has been held not to apply to leases from the Crown.[8]

SUB-SECTION 2—THE STATUTORY LEASE.

The present sub-section has to do with the seventeen jurisdictions in which provision is made for leases in prescribed form being registered. These seventeen are: The nine Australasian jurisdictions, Federated Malay States, Trinidad-Tobago, Jamaica, Leeward Islands, and four Canadian—Manitoba, Saskatchewan, Alberta, North-West Territories.

The statutes in all seventeen expressly authorize the creation of leases by means of the execution and registration of an instrument in prescribed form, and in every one a distinction is drawn between ordinary leases and leases for short terms (three years or one year). There is however a lack of complete uniformity in the statutory provisions. The short term leases are, either expressly or impliedly, excepted from the necessity of being registered,[1] but in South Australia, Queensland, Papua, New Zealand, Fiji, Federated Malay States, and Trinidad-Tobago,[2] express or implied permission is given for their registration, and the benefit of an option of purchase may be lost to the lessee for want of registration—at any rate in South Australia, Papua, Fiji, Federated Malay States, and Trinidad-Tobago. In Trinidad-Tobago "no lease, unless registered, shall be valid against any registered transferee," &c. (s. 68), but this may refer to statutory leases only.

The majority of the statutes enact that an ordinary lease by the owner of the land "shall" be created by the statutory method, the

[6] B. C. 1911, ss. 2, 20A, 77-83. And see under "Mortgages" *ante*, p. 276.

[7] B. C. 1911, ss. 34, 104.

[8] B. C. 1911, s. 35; *Re Canadian Explosives* [1918] 1 W. W. R. 399 (B. C.).

[1] "Tenancies and Occupation Leases," *ante*, p. 90; Aust. Torr. Syst. 811-815.

[2] S. A. 1886, ss. 116, 119; Q. 1861, s. 52, and 1877, s. 18; P. 1913, ss. 41, 42; N. Z. 1915, s. 93; Fi. 1876 (1906), ss. 49, 50; F. M. S. 1911, ss. 36, 37; Tr. 1902, ss. 67, 68.

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permission to create short registrable leases (when given) being given by use of the word "may." In four jurisdictions—Victoria, Western Australia, Jamaica, Manitoba [3]—the word "may" is used instead of "shall" in reference to leases in general, but the meaning is the same, and the direction that ordinary leases are only to be created by the statutory method is as peremptory as if "shall" were used.[4] In the six remaining—New South Wales, Tasmania, Leeward Islands, Saskatchewan, Alberta, North-West Territories [5]—the word "shall" is used, and no reference is made to excepted short leases being registrable.

In the majority of statutes a lease for "life or lives," as well as a term of years, may be created, but in five jurisdictions—Victoria, Western Australia, Fiji, Federated Malay States, Leeward Islands—this reference to leases for life or lives is omitted.

In Victoria, Western Australia, and Jamaica,[6] the lease is referred to as being a lease of "freehold" land, and a separate enactment makes the statute applicable to leasehold land in the same way as to freehold. In other jurisdictions the word "land" only is used, and this includes leasehold when placed on the register as a subject of substantive ownership.

Leases may also be made by mortgagees, and by owners subsequently to the registration of a mortgage. These matters are dealt with under "Mortgages" *ante,* pp. 249, 270.

Leases may be made by persons who are neither owners nor mortgagees, where express authority is conferred by statutes other than the registration statutes, and the lease operates without registration. Such is the case of a lease made by a local government authority in performance of a power to realize unpaid rates.[7]

The statutory lease so far differs from the statutory transfer and the statutory mortgage that it operates precisely as a lease of unregistered land does. The transfer differs in many respects from an ordinary conveyance, and the mortgage differs from an ordinary mortgage chiefly in being by way of charge only. The lease resembles a non-statutory lease in that it vests the land in the lessee for the term specified in the instrument, subject to payment of rent and observance of covenants, &c., just as in the case of unreg-

[3] V. 1915, s. 131; W. A. 1893, s. 91; J. 1888, s. 70; M. 1913, ss. 78 (*d*), 101.

[4] *Crowley* v. *Templeton* (1914) 17 C. L. R. 457.

[5] N. S. W. 1900, s. 53; Tas. 1862, s. 47; L. Is. 1886 (1914), s. 56; Sas. 1917, s. 92; Al. 1906, s. 54; Can. 1906, s. 88.

[6] V. 1915, ss. 38, 131; W. A. 1893, ss. 39, 91; J. 1888, ss. 34, 70.

[7] *Kirkham* v. *Julian* (1885) 11 V. L. R. 171, referred to in Aust. Torr. Syst. 847.

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istered land. The differences are that the estate vests by virtue of the registration and not of any technical words such as "demise" in the instrument, that the instrument (like other statutory instruments) need not be under seal, and that certain rights and liabilities are given to and imposed on lessor and lessee respectively by the statutes themselves.

Since the statutory lease approximates more closely in form and mode of operation to assurances of unregistered land than do either the statutory transfer or the statutory mortgage, there is less doubt as to what parts of the general law—statute and non-statute law—apply to the statutory lease, and less difficulty in applying them.

There is the same substantial uniformity in the prescribed form of lease as in the case of transfer and mortgage. In all seventeen jurisdictions the instrument contains a statement as to lessor being the registered owner of the land, and the operative word "lease" is used, the land being expressed to be leased to the lessee to be held by him for a specified term at a specified rent. In every jurisdiction but Leeward Islands the prescribed form also contains directions to insert either special clauses or modifications of implied clauses, and in some cases both, the reference to "special" clauses being omitted in Fiji and Federated Malay States, and "modifications" only being referred to in these two.

The instrument of lease, in order to be registrable, must purport to be made in pursuance of the registration statute. This is usually indicated by the statement that the lessor is the registered owner of the land. A lease which makes no reference to the proper statute, but does refer to a statute relating to unregistered land, differs in substance from the prescribed form and is not registrable as a statutory instrument.[8]

Unlike the mortgage in this respect, the prescribed form of lease itself contains no covenants or clauses beyond the operative word "lease" and statement of the length of term and amount of rent. But in every jurisdiction except Leeward Islands[9] certain covenants, &c., are implied in the instrument, viz. on the part of the lessee a covenant to pay rent, to pay (except in Saskatchewan) rates and taxes, to keep in repair; also power for the lessor to enter and view the state of repair and re-enter on default or breach of covenant. In Trinidad-Tobago and Manitoba[10] (where there is no substantive enactment authorizing modification of implied

[8] *Crowley* v. *Templeton* (1914) 17 C. L. R. 457; *Shore* v. *Green* (1890) 6 Man. R. 322, where the court was divided.

[9] The "ordinary legal remedies" of lessor and lessee seem intended to be made use of: see L. Is. 1886 (1914), s. 58.

[10] Tr. 1902, ss. 71, 72; M. 1913, ss. 102, 103.

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covenants generally) these implied covenants and powers only take effect so far as the instrument itself does not shew a contrary intention, and this is so in the other jurisdictions. In South Australia, Fiji, and Federated Malay States,[11] a power in the lessor "to distrain according to law" is also included in the implied powers conferred by the lease, but there seems hardly room for doubt that such a power exists in all jurisdictions; in Federated Malay States there is also implied a covenant by the lessor to pay the State quit rent. In Queensland and Papua [12] the covenant to pay rent is suspended on the destruction of a demised building by fire, &c., without the lessee's default,[13] though in Queensland this provision does not apply to a lease of settled land by a tenant for life. In the remaining jurisdictions—New South Wales, Tasmania, Victoria, Western Australia, New Zealand, Jamaica, Saskatchewan, Alberta, North-West Territories [14]—only the covenants and powers first above mentioned are implied, together with authority to modify or negative them, with some variations in detail;[15] in Saskatchewan, for instance, no covenant to pay taxes is implied.

Though the contrary view is supported by some judicial opinion,[16] it has been definitely held that these implied covenants can be so incorporated into the instrument of lease that an action may be brought for their breach, notwithstanding that the lease is not registered;[17] this construction places the implied covenants, &c., on precisely the same footing as clauses expressly introduced into the instrument and not merely implied by virtue of its registration.

Whilst all the statutes (except that of Leeward Islands) in general terms permit the introduction into the statutory lease of special clauses, in eleven jurisdictions—New South Wales, Queensland, South Australia, Tasmania, Papua, New Zealand, Fiji, Trinidad-Tobago, Saskatchewan, Alberta, North-West Territor-

[11] S. A. 1886, ss. 124, 125, 262; Fi. 1876 (1906), ss. 52, 53, 114; F. M. S. 1911, ss. 39, 40, 85.

[12] Q. 1861, ss. 70, 71, 76; 1877, s. 31; 1886, s. 69 (7). P. 1913, ss. 76, 77, 78, 83.

[13] This has been held (in an inferior court only) to apply to any tenancy, even though under an unregistrable lease: *Hill* v. *Cox* (1881) 1 Q. L. J. 78.

[14] N. S. W. 1900, ss. 78, 79, 80; Tas. 1862, ss. 49, 50, 90; V. 1915, ss. 132, 133, 176; W. A. 1893, ss. 92, 93, 131; N. Z. 1915, ss. 97, 98, 166; J. 1888, ss. 71, 72, 100; Sas. 1917, ss. 65, 93, 94; Al: 1906, ss. 55, 56, 131; Can. 1906, ss. 89, 90, 172.

[15] Aust. Torr. Syst. 832; Can. Torr. Syst. 352 (written before the passing of Sas. 1917, s. 93).

[16] See *Munro* v. *Adams* (1891) 17 V. L. R. 703; Aust. Torr. Syst. 908.

[17] *Telfer* v. *Fisher* (1910) 15 West. R. 400 (Al.).

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ies [18]—express permission is given to introduce a clause giving the lessee an option of purchasing the land. In Federated Malay States this permission seems to be implied by the statute,[19] but the statutes are silent on the subject in Victoria, Western Australia, Jamaica, and Manitoba, and of course also in Leeward Islands. On principle, though there appears to be no authority in point, the general permission to introduce special clauses would seem to include an option of purchase in those jurisdictions in which the statutes say nothing of it.[20] Where the clause is expressly permitted, it seems clear that the option of purchase is so far an integral part of the lease that a duly registered transferee from the lessee would be protected and entitled to exercise the right of purchase even if the lessor had inserted the clause wrongfully.[21] And, notwithstanding a decision to the contrary, the right principle seems to be that the lessee, if duly registered, can himself have specific performance of the contract.[22] The option, though assignable and exercisable by the lessee's transferee,[23] is usually made exercisable only during the currency of the lease; but this condition may be implied, so as to prevent the option being one for an indefinite time.[24] All these considerations seem to apply in those jurisdictions in which the option of purchase is not mentioned in the statutes.

The option of purchase, if it once becomes a binding contract of sale, can be enforced by the lessor as well as the lessee, and the fact that the lessee has mortgaged his lease will be no defence to an action for specific performance by the lessor.[25] The transfer of the fee simple to the lessee, in such a case, will not have the effect of merging the mortgage and lease, but both lease and mortgage

[18] N. S. W. 1900, s. 53; Q. 1861, s. 61; S. A. 1886, s. 117; Tas. 1862, s. 47; P. 1913, s. 41; Fi. 1876 (1906), s. 49; Tr. 1902, s. 67; Sas. 1917, s. 92; Al. 1906, s. 54; Can. 1906, s. 88.

[19] F. M. S. 1911, ss. 36, 37.

[20] See *Crowley* v. *Templeton* (1914) 17 C. L. R. 457, 466, where the general principle is laid down that the parties to a lease are free to make their own bargain, much as in the case of a mortgage in *In re Goldstone's Mortgage* [1916] N. Z. R. 489, 500. And see *Bucknall* v. *Reid* (1876) 10 S. A. R. 188, where a beer covenant was introduced into a lease.

[21] *Rutu Peehi* v. *Davy* (1890) 9 N. Z. R. 134, 151; *St. Germain* v. *Reneault* (1909) 12 West. R. 169 (Al.).

[22] *Fels* v. *Knowles* (1906) 26 N. Z. R. 604; *Horne* v. *Horne*, *ib.* 1208, 1218. The contrary decision is *St. Germain* v. *Reneault*, *supra*.

[23] *In re Clark and Harvey* (1868) 10 S. A. R. 191; *Shearer* v. *Wilding* (1915) 15 S. R. (N. S. W.) 283.

[24] *Shearer* v. *Wilding*, *supra*.

[25] *Bevan* v. *Dobson* (1906) 26 N. Z. R. 69.

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will appear noted on the register, though the freehold title is vested in the lessee as registered owner of the land.[26]

The construction of both implied and expressly introduced clauses in the lease is affected, in some jurisdictions, by enactments which purport to make covenants, &c., in statutory instruments binding on the successors in title of the parties. The jurisdictions referred to are the seven Australian, New Zealand, and Jamaica. In others there are no corresponding enactments. In New South Wales, Queensland, South Australia, Tasmania, Papua, and New Zealand,[27] an interpretation clause provides that the description of a person as "lessor," "lessee," includes the "heirs, executors, administrators, and assigns" of the person named. The effect of the enactment is to make covenants, &c., in a lease binding on the assigns of both lessor and lessee, as though assigns were expressly named.[28] In Victoria, Western Australia, and Jamaica,[29] there is no such interpretation clause, but by a substantive enactment transferees are given "the same estates, rights, powers, and remedies," and are "subject to the same engagements, obligations, and liabilities," as if they had been the original proprietors, lessees, &c. This appears to have the same effect as an enactment [30] making a covenant binding on "transferees." The mention (expressly or impliedly) of "assigns" is not, however, necessary to make rights of property assignable,[31] and this of course applies in jurisdictions whose statutes do not contain these enactments.

Except in Federated Malay States, Leeward Islands, and Manitoba, the statutes authorize the use of certain short forms of covenant, the full meaning of which is set out in the statute. In New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Papua, New Zealand, Fiji, and Jamaica,[32] there are twelve of these covenants, in Trinidad-Tobago, Alberta, and North-West Territories five, and in Saskatchewan six.[33] In South

[26] *Bevan* v. *Dobson, supra.* Compare *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631, 647; Aust. Torr. Syst. 937.

[27] N. S. W. 1900, s. 3; Q. 1861, s. 3; S. A. 1886, s. 3; Tas. 1862, s. 3; P. 1913, s. 5; N. Z. 1915, s. 222.

[28] *Dunbar's Off. Assignee* v. *Deal* (1888) 7 N. Z. R. 9.

[29] V. 1915, s. 269; W. A. 1893, s. 228; J. 1888, s. 106. And see Aust. Torr. Syst. 921.

[30] A case on such an enactment is *Seabrook* v. *McMullan* (1908) 10 W. A. R. 47.

[31] *Shearer* v. *Wilding* (1915) 15 S. R. (N. S. W.) 283.

[32] N. S. W. 1900, s. 81; Q. 1861, s. 73; S. A. 1886, s. 265, sch. 16; Tas. 1862, s. 65; V. 1915, s. 134, sch. 10; W. A. 1896, s. 94, sch. 12; P. 1913, s. 80; N. Z. 1915, s. 165, sch. 6; Fi. 1876 (1906), s. 55, sch. E; J. 1888, s. 73, sch. 7.

[33] Tr. 1902, s. 79; Al. 1906, s. 58, sch. L; Can. 1906, s. 92, sch. M Sas. 1917, s. 96, f. O.

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Australia and New Zealand express permission is given in the statutes to modify these short forms; in Victoria, Western Australia, Fiji, Jamaica, Saskatchewan, Alberta, and North-West Territories, the forms may be modified, and the covenants are to be construed as made with the lessor and his transferees and binding on the lessee's transferees. These provisions are probably implied in other jurisdictions.

The twelve covenants above referred to in New South Wales, &c., are the following: To insure against fire; to paint outside; to paint and paper inside; to fence; to cultivate; not to use as a shop; not to carry on offensive trades; not to assign or sub-let without leave; not to cut timber; to conduct publican's business in an orderly manner; to apply for a renewal of license; to facilitate transfer of license. The five covenants in Trinidad-Tobago are: To insure; not to use as a shop; not to carry on offensive trades; not to assign; not to cut timber. The five in Alberta and North-West Territories are: not to assign; to fence; to cultivate; not to cut timber; not to carry on offensive trades. These five are also in Saskatchewan, with a sixth being a covenant to pay taxes. These covenants are, in the different jurisdictions, drafted in almost identical words. The only two that require special notice here are the covenant to insure and the covenant not to assign.

The covenant to insure is one to insure against fire "buildings"—in Jamaica "buildings, fixtures, and machinery"—either "erected" on the land, or which are "for the time being erected." In South Australia, Victoria, Western Australia, Fiji, and Jamaica, the expression is "for the time being erected," in other jurisdictions simply "erected." But the two expressions mean the same thing, and the lessee must, if bound to insure buildings "erected," insure all buildings that at any time during the currency of the lease are erected on the land.[34]

The covenant not to assign binds the lessee not to transfer or sub-let without the previous consent in writing of the lessor. The construction of this covenant is not quite the same as in the case of unregistered land under the general law. Since a statutory mortgage of registered land is a charge only and not a conveyance, the covenant is not broken by a mortgage in statutory form being executed and registered.[35] And since an unregistered instrument of transfer or lease—except certain short leases—does not operate to pass any actual estate in the land, even a transfer or sub-lease

[34] *Reid* v. *Smith* (1905) 3 C. L. R. 656, 662, 681.

[35] *Seabrook* v. *McMullan* (1908) 10 W. A. R. 47. This is in accordance with the principle underlying all systems in which a mortgage is a charge and not a conveyance: see *Josef* v. *Mulder* [1903] A. C. 190.

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executed by the lessee—not being a short lease operative without registration—will not, unless registered, constitute a breach of the covenant in the above form.[36] If the covenant binds the lessee not to mortgage, a registered mortgage in statutory form will constitute a breach, but not the mere execution of the mortgage without registration.[37] A covenant simply not to transfer or sub-let is not broken by parting with the possession of the land,[38] but of course there is nothing to prevent another form of covenant being used under which any parting with the possession would be a breach, and some of the statutory covenants are to this effect.[39]

As under the general law, a transfer or assignment by operation of law is not affected by a covenant against assignment.[40]

Others of the covenants which may be introduced into the lease by means of the statutory short forms require no special mention. Questions arising under these, as well as other questions on the construction of leases, are frequently decided without any special application of the principles governing registration of title or the registration statutes themselves. In a case already cited, for instance, the question was raised whether the covenant to carry on a licensed victualler's business was broken by the lessee ceasing to carry on the business personally, and it was held that there had been no breach.[41] So questions have been dealt with, in cases of leases of registered land, relating to covenants to keep books and returns of gold in gold-mining,[42] covenant by lessor to pay the value of buildings at the expiration of lease,[43] covenant by lessee to "forthwith" complete alterations in buildings,[44] option of purchase,[45] the inclusion of furniture in a lease of land,[46] to what extent buildings, &c., must be attached to the soil,[47] whether a

[36] *Naumberg* v. *Albertson's Executors* (1889) 3 Q. L. J. 125; *Martin* v. *Caultas* [1911] S. A. R. 1; *Macindae* v. *Wehrle* (1913) 13 S. R. (N. S. W.) 500.

[37] *Tattley* v. *Cooper* (1905) 25 N. Z. R. 18.

[38] *Seabrook* v. *McMullan, supra.*

[39] *Martin* v. *Caultas, supra; McEacharn* v. *Colton* [1902] A. C. 104; *Staehr* v. *Federal Lime Co.* [1912] S. A. R. 102.

[40] *Ex p. Bond* (1880) 6 V. L. R. L. 458; *Ex p. Ellison* (1879) 5 V. L. R. L. 59.

[41] *Seabrook* v. *McMullan, supra.*

[42] *Baker's Creek G. M. Co.* v. *Hack* (1894) 15 N. S. W. Eq. 207.

[43] *Dunbar's Off. Assignee* v. *Deal* (1888) 6 N. Z. R. 636, 7 *ib.* 9.

[44] *Measures* v. *McFadyen* (1910) 11 C. L. R. 723.

[45] *Shearer* v. *Wilding* (1915) 15 S. R. (N. S. W.) 283.

[46] *Crowley* v. *Templeton* (1914) 17 C. L. R. 457, 464.

[47] *Reid* v. *Smith* (1905) 3 C. L. R. 656: *Pukuweeka Saw Mills* v. *Winger* [1917] N. Z. R. 81.

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document is a sub-lease or an assignment,[48] what trees are included in "timber,"[49] whether a clause is a "covenant" or a "condition,"[50] construction of covenants to repair an hotel.[51]

Although registration of the lease, which answers to the vesting of the legal term under the general law, is necessary for the complete security of both lessor and lessee, yet the unregistered lease is for many purposes effective,[52] and more so than either transfer or mortgage unregistered. This is shewn in actions for rent, actions on covenants, and proceedings for relief against forfeiture.

Where the lease (unregistered) contains an express covenant to pay rent and the lessee goes into occupation, an action for the rent will sometimes lie, and the lessor will recover either by virtue of the covenant or under a claim for use and occupation.[53] This seems to be so in all jurisdictions where law and equity are administered concurrently on the same side of the court. And it may be that in those jurisdictions the lessor could recover rent from a lessee in possession, even if the unregistered lease contained no express covenant for payment.[54] Where law and equity are administered concurrently the doctrine of *Walsh* v. *Lonsdale*[55] applies, so that a lessee in possession under a written agreement and entitled to specific performance is in the same position as if he had a duly registered lease.[56] But in some jurisdictions (of which New South Wales is an example) law and equity are not administered concurrently, and accordingly a lessor's action on a covenant for rent might be defeated by reason of the lease not being registered, since at common law rent issues out of the land, and in the absence of a legal demise no rent is due.[57]

[48] *Miller* v. *Commr. for Railways* (1900) 2 W. A. R. 38.

[49] *Munday* v. *Prowse* (1878) 4 V. L. R. 101.

[50] *Sanders* v. *Wadham* (1870) 4 S. A. R. 73.

[51] *Messiter* v. *Wollerman* (1907) 27 N. Z. R. 589.

[52] *Otago Harbour Board* v. *Spedding* (1885) 4 N. Z. S. C. 272; *Waitara* v. *McGovern* (1899) 18 N. Z. R. 172; *Moore* v. *Public Trustee* (1900) 20 N. Z. R. 288. See Aust. Torr. Syst. 932.

[53] *Munro* v. *Adams* (1891) 17 V. L. R. 703. See *Bank of New South Wales* v. *Palmer* (1881) 2 N. S. W. 125, where the mortgagees sued, and the lessee was not registered.

[54] See *Telfer* v. *Fisher* (1910) 15 West. R. 400 (Al.), cited in note 17 *ante*, p. 336.

[55] (1882) 21 Ch. D. 9. Compare the position of a tenant in possession in some jurisdictions as against the registered owner, after a contract for sale of the land to the tenant: Aust. Torr. Syst. 812; *ante*, p. 92.

[56] *Timaru (Mayor)* v. *Hoare* (1898) 16 N. Z. R. 582; *Dufaure* v. *Kenealy* (1908) 28 N. Z. R. 269; *Davis* v. *McConochie* (1915) 15 S. R. (N. S. W.) 510, 515, where the difference between New South Wales and other Australian jurisdictions is pointed out.

[57] *Johnson* v. *Billyard* (1890) 11 N. S. W. 319, a New South Wales case on a lease of land in Fiji; *Davis* v. *McConochie*, *supra*.

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The cases first cited illustrate the liability of the lessee on his covenants in an unregistered lease. The lessor is also liable on his covenants in the same way. Thus, where the lease contained a covenant for quiet enjoyment and the lessor transferred to a purchaser, whose registration enabled him to hold the land free of the unregistered lease, the lessee recovered damages from the lessor for breach of the covenant for quiet enjoyment.[58]

Apart from the effect on unregistered leases of the concurrent administration of law and equity, rent may be recovered even under an unregistered lease which is void, where the lessee has taken possession and already paid some rent.[59]

Relief against forfeiture has been given in cases where the transfer of a registered lease was itself unregistered,[60] and where neither lease nor transfer were registered.[61]

The necessity for registration of a lease, in order to confer a complete title on both parties, arises in most jurisdictions by reason of the enactments which declare that no estate in the land passes by an unregistered instrument.[62] In Trinidad-Tobago, Fiji, and Federated Malay States[63]—though the enactment seems unnecessary—it is expressly enacted that a lease is not "valid" unless registered. The effect of registration is precisely similar to the legal vesting of the term in the lessee under the general law,[64] and both parties then have the rights and liabilities conferred by the general law of landlord and tenant.

The method of registration of leases and transactions with them differs in some respects from that of transfers and mortgages, and varies in different jurisdictions. Although a registered lease made by the registered owner of land creates the same leasehold estate as is enjoyed under a lease by virtue of which the lessee (not taking from a registered owner) is registered after formally making an application for initial registration, yet in the latter case the lessee's interest is usually spoken of as "leasehold land." The reference here is not to this "leasehold land," but to interests under leases made by lessors already on the register.

In eight jurisdictions—New South Wales, Queensland, South Australia, Papua, New Zealand, Fiji, Federated Malay States,

[58] *Shore* v. *Green* (1890) 6 Man. R. 322, referred to in Can. Torr. Syst. 179.

[59] *Otago Harbour Board* v. *Spedding* (1888) 4 N. Z. S. C. 472.

[60] *Tucker* v. *Armour* (1907) 6 West R. 93 (N. W. T.).

[61] *Dufaure* v. *Kenealy* (1908) 28 N. Z. R. 269.

[62] *Davies* v. *McConochie*, *supra*. For the enactments, see *ante*, pp. 113-116.

[63] Tr. 1902, s. 68; Fi. 1876 (1906), s. 49 (1); F. M. S. 1911, s. 36.

[64] *Doris* v. *McConochie*, *supra*.

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Jamaica [65]—no special reference to the method of registering leases is made by the statutes, and the relevant enactments are those that provide for all registered transactions being entered on the owner's folium of the register; among the sections cited, one in New South Wales provides for even transactions with leasehold land being entered on the freehold register (when constituted). The registered lease is thus, though not actually so referred to, regarded by these statutes as an incumbrance on the lessor's land and registered ownership.

In Tasmania [66] these enactments are supplemented by others specially referring to leases, by which in effect a lease may be registered independently of the lessor's register, much as though it were leasehold land in an initial application. In Victoria [67] nearly the same result is attained by provisions that allow transactions with a lease to be registered on the lease itself instead of on the lessor's register; leases may also be registered in triplicate, and provision is made for a separate sub-lease register. In Western Australia [68] provision is also made for a sub-lease register, and leases may be registered in triplicate. In Trinidad-Tobago [69] the enactments are the same as in New South Wales, with the additional provision (apparently unnecessary) that a lease, when presented for registration, is to be "endorsed as an incumbrance on" the lessor's register.

The remaining five jurisdictions all contain special reference to registration of leases. In Leeward Islands [70] a lease is to "be deemed an incumbrance" for some purposes, and is to be entered on the lessor's register. In Manitoba [71] the lease is to be registered independently of the lessor's register, somewhat as in Tasmania. In Saskatchewan, Alberta, and North-West Territories [72] also, the registration of the lease may be made independently; in Saskatchewan, "upon registration of the leasehold title" the lessor's certificate of title is to be retained in the registry on behalf of all persons interested in the land, lessor and lessee being each entitled to a certificate of the registration of the lease.

[65] N. S. W. 1900, ss. 32, 34, 35; Q. 1861, ss. 32, 34; S. A. 1886, ss. 49, 50; P. 1913, ss. 17, 20; N. Z. 1915, ss. 33, 34; Fi. 1876 (1906), ss. 32, 34; F. M. S. 1911, ss. 18, 20; J. 1888, ss. 40, 43.

[66] Tas. 1862, ss. 31, 34; 1893, ss. 10-12.

[67] V. 1915, ss. 47, 51, 52, 54, 140, 141.

[68] W. A. 1893, ss. 48, 52, 54, 100, 101.

[69] Tr. 1902, ss. 33, 38, 40, 69.

[70] L. Is. 1886 (1914), ss. 56, 58.

[71] M. 1913, s. 101.

[72] Sas. 1917, s. 92 (2, 3); Al. 1906, s. 26 (5); Can. 1906, s. 54.

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The lease, so far as relates to any warranty of title conferred on the lessee, will stand on the same footing as a mortgage—if merely registered on the lessor's register folium (as to which see *ante,* p. 201). If registered independently of the lessor's ownership, the lessee will get the benefit of the warranty of title secured to him by the statutory provisions relating to conclusiveness of the register (*ante,* p. 96): The registry officers are justified in refusing to register a lease that is clearly invalid.[73] As to whether an invalid transfer of a lease should be accepted for registration, judicial opinion is not uniform. Thus a transfer of lease made in breach of a covenant against assignment has been held to be rightly refused registration in Tasmania, though a contrary decision has been given in New Zealand.[74] Apparently a transferee, although registered, would only be entitled to rely on his registration as against the lessor if he took without notice of a breach of covenant.[75] The case of a lessee liable to re-entry for default must be taken to be excepted from the warranty conferred by registration, and in most jurisdictions this is expressly provided for—in all seventeen except Leeward Islands and Federated Malay States. Thus, in South Australia and Fiji[76] special provision is made for recovery of possession by lessor from lessee in default, and in the remaining thirteen the case of lessor against lessee is excepted in the enactment which prohibits possession of land being recovered from a registered owner.[77] It is not however every default of a lessee that gives a lessor the right to recover the land, but only a default under which by the terms of the lease the lessor can re-enter.[78]

Though in general the law of landlord and tenant applies to leases of registered land, this law is necessarily modified to some extent by the machinery of the registration system, and in some instances the general statutes embodying landlord and tenant law expressly enact that certain provisions are to apply to registered

[73] *Rex* v. *Registrar of Titles* (1915) 20 C. L. R. 379.

[74] *Sullivan* v. *Recorder of Titles* (1913) 9 Tas. R. 57; *In re Duggan* (1884) 2 N. Z. S. C. 144. *McEacharn* v. *Colton* [1902] A. C. 104, seems to support the Tasmanian decision.

[75] *In re Duggan, supra; Baker's Creek G. M. Co.* v. *Haek* (1894) 15 N. S. W. Eq. 207.

[76] S. A. 1886, s. 192; Fi. 1876 (1906), s. 103.

[77] N. S. W. 1900, s. 124; Q. 1861, s. 123; Tas. 1862, s. 124; V. 1915, s. 244; W. A. 1893, s. 199; P. 1913, s. 144; N. Z. 1915, s. 59 (1); Tr. 1902, s. 132; J. 1888, s. 135; M. 1913, s. 84; Sas. 1917, s. 159; Al. 1906, s. 104; Can. 1906, s. 142.

[78] *Sanders* v. *Wadham* (1870) 4 S. A. R. 73, 76; *Bucknall* v. *Reid* (1876) 10 S. A. R. 188.

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land. General statutes are also sometimes referred to in reported cases as applicable.

Statutes usually known as Landlord and Tenant Acts apply, as a rule, on such matters as relief against forfeiture, actions for use and occupation, &c.[79]

There is the same right to an injunction against threatened breach of covenant as in the case of leases of unregistered land, and the remedy of injunction is even more readily available by reason of title conferred by registration on a bonâ fide purchaser.[80]

In New South Wales the subject of an equitable contract of lease is declared to be a leasehold for certain purposes under the registration statute.[81]

In Victoria Part III of the Conveyancing Act 1915, relating to leases (ss. 14-26), is expressly made applicable to registered land. These enactments are taken from the English Conveyancing Acts, and deal with forfeiture, &c.

The registration statutes themselves contain provisions which must primarily govern the rights of parties with regard to such matters as leases of land in mortgage, leases by mortgagees, transfer of lease, transfer of reversion, forfeiture for breach of covenant or condition, surrender, extension of lease. On the other hand, relief against forfeiture is a matter governed by general legislation and not the registration statutes.

The subjects of leases of land already in mortgage, and leases by mortgagees, are dealt with under "Mortgages" *ante,* pp. 249, 265.

The subject of transfer of lease is dealt with under "Transfer," *ante,* p. 325. The question of the existence and effect of a covenant against assignment must also be taken into account, and this is referred to *ante,* pp. 339, 344. The transferee takes all the rights of the lessee, including the right to surrender the lease.[82]

On breach by the lessee of the covenants or conditions of the lease the lessor can re-enter and take possession. In Leeward Islands there is no such power distinctly conferred by the statute.

[79] See *Munro* v. *Adams* (1891) 17 V. L. R. 703; *Martin* v. *Coultas* [1911] S. A. R. 1; *Re Tucker and Armour* (1906) 4 West. R. 394 (N. W. T.), quoted in Can. Torr. Syst. 354.

[80] *McEacharn* v. *Colton* [1902] A. C. 104; *Munday* v. *Prowse* (1878) 4 V. L. R. 101.

[81] Forfeiture and Validation of Leases Act 1905 (No. 8), s. 7 (3)—New South Wales. This Act amends the Forfeiture of Leases Act 1901 (No. 66), and the latter (taken from the English Conv. Acts) has been treated as applicable to registered land: *Measures* v. *McFadyen* (1910) 11 C. L. R. 713; *Brooker's Colours* v. *Sproules* (1910) 10 S. R. (N. S. W.) 839.

[82] *Hare* v. *Terry* (1918) 24 C. L. R. 468, under S. A. 1886, s. 151.

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In other jurisdictions the power that is conferred and implied in the lease varies slightly. In all, the three cases provided for are: rent being in arrear, breach of covenant continuing for a certain time, default in complying with notice to repair. In New South Wales and New Zealand,[83] the period for which rent must be in arrear or breach of covenant continue is six months, in Queensland, Papua, and Trinidad-Tobago [84] six calendar months. In South Australia the period is three months, and in Tasmania three calendar months.[85] In Victoria, Western Australia, and Jamaica [86] the period is one month; in Saskatchewan, Alberta, and North-West-Territories [87] it is two calendar months. In Fiji the period for which rent must be in arrear is three calendar months, and in Federated Malay States three months, whilst for breach of covenant six is in each case substituted for three.[88] Lastly, in Manitoba the rent need only be "in arrear," though breach of covenant must continue for six calendar months.[89]

Unless otherwise expressly stated in the lease, the breach must "continue" for the prescribed period in order that the power of re-entry may arise. It has been held that the covenant against assignment is not a covenant the breach of which can "continue" for a period like six months, and that breach of such a covenant gives no right to re-enter.[90] But the statutory powers may be added to, varied, or negatived.[91] Thus the lessor may have express power conferred upon him to re-enter for breach of covenant "forthwith or at any time thereafter." [92]

Having re-entered in accordance with the terms of his lease (express or implied), the lessor can then, but not until then, have this re-entry recorded on the register;[93] the lessee's interest is then determined, but without releasing him from liability in respect of any breach of covenant. This latter provision as to release from liability is not contained in the Leeward Islands statute, but is possibly to be implied as part of the general landlord and tenant law.

[83] N. S. W. 1900, s. 79; N. Z. 1915, s. 98.
[84] Q. 1861, s. 71; P. 1913, s. 78; Tr. 1902, s. 72.
[85] S. A. 1886, s. 125; Tas. 1862, s. 50.
[86] V. 1915, s. 133; W. A. 1893, s. 93; J. 1888, s. 72.
[87] Sas. 1917, s. 94; Al. 1906, s. 56; Can. 1906, s. 90.
[88] Fi. 1876 (1906), s. 53; F. M. S. 1911, s. 40.
[89] M. 1913, s. 103.
[90] *Sanders* v. *Wadham* (1870) 4 S. A. R. 73.
[91] *Bucknall* v. *Reid* (1876) 10 S. A. R. 188.
[92] *Staehr* v. *Federal Lime Co.* [1912] S. A. R. 102, 113.
[93] *Baker's Creek G. M. Co.* v. *Hack* (1894) 15 N. S. W. Eq. 207, 222, 231; *Cairns* v. *Burgess* (1910) 6 Tas. R. 85.

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The enactments authorizing this mode of determining the lease take three forms. In South Australia, Victoria, Western Australia, Papua, and New Zealand,[94] the lessor may either re-enter (apparently without any process in the courts), or he may recover possession of the land by legal proceedings. In New South Wales, Fiji, Federated Malay States, Trinidad-Tobago, and Manitoba,[95] any "lawful" re-entry is sufficient, and this includes re-entry without proceedings in the courts as well as under the authority of legal proceedings.[96] In Queensland, Tasmania, Jamaica, Leeward Islands, Saskatchewan, Alberta, and North-West Territories,[97] re-entry can only be made under the authority of legal proceedings.[98]

Satisfactory evidence of re-entry or recovery of possession must be furnished to the registry, but the fact of re-entry being recorded on the register is not inconsistent with the lessee being still in possession.[1]

The re-entry, in order to be lawful, must comply with any requirements of the law relating to landlord and tenant, even though these may not be contained in the registration statutes. Thus, in many jurisdictions the provisions of the English Conveyancing Acts have been adopted, requiring notice of the breach relied on to be given to the lessee, and these provisions apply to leases of registered land.[2] But the power of re-entry given by the registration statutes themselves can be exercised without complying with the common law rules as to the demand of rent.[3]

As already stated (p. 346), though the registration statutes say nothing of relief against forfeiture, the general legislation under which the courts are empowered to relieve a lessee from the strict consequences of a breach of covenant or condition in his lease

[94] S. A. 1886, s. 126; V. 1915, ss. 136, 144; W. A. 1893, ss. 96, 104; P. 1913, s. 45; N. Z. 1915, s. 99.

[95] N. S. W. 1900, s. 55; Fi. 1876 (1906), s. 54; F. M. S. 1911, s. 41; Tr. 1902, s. 73; M. 1913, s. 104.

[96] *Baker's Creek G. M. Co.* v. *Huck*, *supra*; *McFadyen* v. *Measures* (1910) 10 S. R. (N. S. W.) 190, 199.

[97] Q. 1861, s. 72; Tas. 1862, s. 51; J. 1888, s. 75; L. Is. 1886 (1914), s. 70; Sas. 1917, s. 95; Al. 1906, s. 57; Can. 1906, s. 91.

[98] *Re Tucker and Armour* (1906), 4 West. R. 394 (N. W. T.); Can. Torr. Syst. 353; Aust. Torr. Syst. 939.

[1] *Brooker's Colours* v. *Sproules* (1910) 10 S. R. (N. S. W.) 839.

[2] *McFadyen* v. *Measures* (1910) 10 S. R. (N. S. W.) 190, 197, 198, referring to the Forfeiture of Leases Act 1901 (No. 66)—New South Wales; *Martin* v. *Coultas* [1911] S. A. R. 1, referring to the Landlord and Tenant Act of 1893 (No. 580)—South Australia. See notes 36, 81 *supra* — 340, 345: In *Staehr* v. *Federal Lime Co.* [1912] S. A. R. 102, the provision as to notice in the South Australian Act just referred to was held not to apply under the circumstance.

[3] *McFadyen* v. *Measures*, *supra*, at pp. 198, 199.

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applies to leases of registered land. For the most part, where such general legislation is in force, it follows the lines of the English enactments on the subject. Sometimes however the local statute differs. In South Australia, for instance, the usual exception of covenants against assignment is omitted, and the power of granting relief against forfeiture on assignment is extended to cases where "the consent of the lessor has been vexatiously or capriciously withheld;[4] it has been held that the Act applies to covenants against assignment only when the lessor's consent has been improperly withheld.[5]

The relief can be granted by the court even after the determination of the lease by formal registration of the lessor's re-entry.[6]

In four jurisdictions—South Australia, Tasmania, Western Australia, Fiji [7]—provision is made for "extension" of a lease by registration of a supplemental instrument extending the term, the consent of the mortgagee being necessary where the lease is subject to a mortgage. In Trinidad-Tobago [8] there is also an enactment (apparently taken from the Fiji statute) that a lease "may be extended in manner hereinafter mentioned," but nothing more.

Sub-leases are mentioned in some statutes, and in some expressly authorized, and in three—Manitoba, Leeward Islands, Federated Malay States—not mentioned at all. Even in these three jurisdictions sub-leases would seem to be valid and registrable transactions.[9] In many jurisdictions the only reference to sub-leases is contained in the statutory form of covenant against subletting, &c.; these are: New South Wales, Queensland, Papua, Trinidad-Tobago, Jamaica, Saskatchewan, Alberta, North-West Territories. In Fiji sub-leases for a year and upwards are not "valid unless registered," and in South Australia and New Zealand sub-leases are protected in the event of surrender of the head-lease.[10] In Tasmania [11] the statutory provisions relating to leases are expressly made applicable to sub-leases, with necessary modifications. Only in Victoria and Western Australia is provision made for a separate register of sub-leases; a special enactment also makes

[4] Act to amend the Law of Landlord and Tenant (No. 580, 1893). *Martin* v. *Coultas* and *Staehr* v. *Federal Lime Co.* (*supra*) were both decided under this Act.

[5] *Staehr* v. *Federal Lime Co.*, *supra*.

[6] *Brooker's Colours* v. *Sproules* (1910) 10 S. R. (N. S. W.) 839.

[7] S. A. 1886, ss. 153, 154; Tas. 1886, ss. 24, 25; W. A. 1893, s. 105 (1909, s. 13); Fi. 1876 (1906), ss. 51, 59.

[8] Tr. 1902, s. 69.

[9] See observations in Aust. Torr, Syst. 934, 935.

[10] Fi. 1876 (1906), s. 49 (2); S. A. 1886, s. 223; N. Z. 1915, s. 96 (2).

[11] Tas. 1893, s. 12.

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it an implied covenant in every sub-lease that the sub-lessor will observe the conditions of the head-lease.[12]

The inconvenience of having to produce the head-lessor's certificate of title at the registry when a sub-lease is to be registered is obviated in Victoria and Western Australia, and also in Fiji, by allowing the necessary entries to be made on the lease itself instead of on the main register.[13]

It is only in South Australia, Tasmania, Victoria, Western Australia, and New Zealand,[14] that the question of the status of a sub-lease, after the determination of the head-lease, is noticed by the statutes. Whilst in South Australia "every surrender" of a lease is "subject to any registered under-lease," in Tasmania, Victoria, and Western Australia this principle has not been followed, and the sub-lease comes to an end if the head-lease is "determined by forfeiture or operation of law or by surrender under" insolvency statutes, &c.; in New Zealand no lease can be surrendered without the consent of the sub-lessee. Apparently, subject always to any express enactment in the registration statutes, the general law of landlord and tenant as to the effect of a determination of the head-lease would override any merely general provision as to the effect of registration: even a registered sub-lease could hardly stand after the destruction of its head-lease—always in the absence of special enactment upholding the sub-lease, of which the South Australian enactment is an example.

The surrender of a lease is provided for in all seventeen jurisdictions except Manitoba, and on being recorded in the register the interest of the lessee "revests" in the reversioner entitled.[15] In all but two—Queensland and Leeward Islands[16]—the consent of a mortgagee is expressly required before a surrender can be registered, but it seems doubtful whether even in the absence of such an enactment an instrument would be accepted for registration behind the back of a mortgagee. In New Zealand[17] the consent of every sub-lessee as well as mortgagee is also required, but the registry would probably treat a sub-lessee as a necessary party to the transaction as in the case of a mortgage. In South Australia a surrender is "subject to any registered under-lease," and also to

[12] V. 1915, ss. 139-144; W. A. 1893, ss. 99-104.

[13] V. 1915, ss. 140, 141; W. A. 1893, ss. 100, 101; Fi. 1876 (1906), s. 49 (2). The case of *In re West* (1890, Udal's Fiji R. 227) was decided before the amending statute of 1892 was passed.

[14] S. A. 1886, s. 123; Tas. 1893, s. 12; V. 1915, s. 142; W. A. 1893, s. 102; N. Z. 1915, ss. 96 (2), 128. See Aust. Torr. Syst. 936-938.

[15] See Aust. Torr. Syst. 935-938.

[16] Q. 1861, ss. 54, 55; L. Is. 1886 (1914), s. 70.

[17] N. Z. 1915, s. 96.

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short leases that do not require registration, so that these would not be affected by the surrender even if registered; the same result would seem to follow from the affirmative enactments in Tasmania, Victoria, and Western Australia, that a sub-lease is determined by forfeiture, &c. of the head-lease,[18] the case of ordinary surrender being impliedly excepted. In the remaining jurisdictions nothing is said about the effect of a surrender on sub-leases, but (as in New Zealand) it seems probable that a sub-lessee as well as a mortgagee would be regarded as a necessary party to a surrender tendered for registration; these remaining jurisdictions are: New South Wales, Papua, Fiji, Federated Malay States, Trinidad-Tobago, Jamaica, Saskatchewan, Alberta, North-West Territories.[19]

Besides surrender by act of the parties the enactments cited also refer (except in the case of New Zealand) to surrender in law and (except in Federated Malay States, Saskatchewan, Alberta, and North-West Territories) under the provisions of bankruptcy or insolvency statutes. In many statutes there are also separate enactments relating to leases in mortgage; the refusal of the mortgagee to take over the lease may operate as a surrender to the reversioner.[20] It is not clear whether such surrenders always have the same effect as other surrenders by act of parties—for instance, with respect to the effect on sub-leases. In South Australia it is expressly enacted that "every surrender . . whether by operation of law," &c. is subject to sub-leases.

[18] S. A. 1886, ss. 120-123; Tas. 1862, s. 48, and 1893, s. 12; V. 1915, s. 138, 142; W. A. 1893, ss. 98, 102.

[19] N. S. W. 1900, s. 54; P. 1913, ss. 43, 44; Fi. 1876 (1906), ss. 51, 56; F. M. S. 1911, ss. 38, 42; Tr. 1902, s. 70; J. 1888, s. 77; Sas. 1917, s. 97; Al. 1906, s. 59; Can. 1906, s. 93.

[20] N. S. W. 1900, s. 91; S. A. 1886, s. 173; Tas. 1862, s. 77; V. 1915, s. 137; W. A. 1893, s. 97; N. Z. 1915, s. 128; J. 1888, s. 76.

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CHAPTER VIII—CREDITORS' RIGHTS. VESTING ORDERS. RECTIFICATION OF REGISTER.

This chapter deals with changes in the registered ownership effected otherwise than by means of statutory instruments or act of the parties, or in consequence of the death of the owner.

SECTION 1—CREDITORS' RIGHTS.

SUB-SECTION 1—BANKRUPTCY, INSOLVENCY, CREDITORS' ASSIGNMENTS.

In five of the twenty-two jurisdictions—Ontario, British Columbia, North-West Territories, British Honduras, Federated Malay States—the registration statutes make no mention of bankruptcy, insolvency, or creditors' assignments, though in Ontario a statutory rule does refer to assiguments.[1] But the law relating to liquidation of debtors' property for the benefit of creditors must, in the absence of special enactment, be taken to apply to registered land as part of the general law—just as the law relating to conveyances in fraud of creditors applies.[2] The only question is, when the registration statutes are silent, as to the exact manner and extent of this application.

In Ontario, the rule referred to authorizes the creditors' assignee to be registered as owner, notwithstanding that the property assigned is described merely in general terms. Both in Ontario and British Columbia there is an enactment to the same effect contained in the statute relating to creditors' assiguments, "subject however as regards land to the provision of the" registration statutes.[3] Such an assignment is a voluntary transaction, and liable to be displaced accordingly by a transaction for value.[4] There seems to be no corresponding enactment in the North-West Territories, but a creditors' assignee would probably be entitled to apply for registration as in other jurisdictions.

In British Honduras the English Bankruptcy Acts have been

[1] On. 1911 Rules, r. 38.

[2] See *Syndicat Lyonnais* v. *McGrade* (1905) 36 Can. S. C. R. 251, where the 13 Eliz. was held to apply in the North-West Territories.

[3] Ontario—Assignments and Preferences Act (R. S. 1914, c. 134), s. 8. British Columbia—Creditors' Trust Deeds Act (R. S. 1911, c. 13), s. 4; by s. 14 the assignment "may be registered in any land registry office."

[4] *Maedonald (John) & Co.* v. *Tew* (1914) 32 O. L. R. 262.

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taken as a model, and the certificate of appointment of a trustee is made registrable as a conveyance.[5]

In the Federated Malay States there are enactments in the state (as distinguished from federal) Civil Procedure Codes by which an insolvent debtor's property vests in the receiver on his appointment,[6] but no reference is made to registration. It has been held that the ordinary rule of English law, by which a creditors' trustee takes subject to equities is overridden by the registration statute, and that the whole legal and beneficial interest of the debtor in land—as appearing on the register—vests in the trustee.[7] Even if this decision holds good in its own jurisdiction, it would hardly be followed to its full extent elsewhere.

In these five jurisdictions the right of the creditors' representative would seem to be an equitable right to be registered in place of the debtor, the registration statutes being construed as the special enactments in virtue of which the full legal ownership of the land can only be taken from the debtor by the registration of the trustee or assignee as owner. This is illustrated by cases (in other jurisdictions) not expressly provided for by the statutes.[8] The authority for change of ownership must (except in Ontario) depend on the powers, express or implied, which the registration statutes confer on the registry or the courts to rectify the register. In Ontario, as stated above, a statutory rule authorizes the creditors' assignee to apply for registration and to be registered accordingly as owner of the debtor's land. And of course a debtor could always transfer his land to an assignee for creditors by a registrable instrument. Owing to the absence, in Ontario and Federated Malay States, of any wide enactment in the registration statutes under which registration generally would carry a warranty of title, the position of a creditors' representative in these two jurisdictions is perhaps less secure than elsewhere. There is in fact in the statutes of Ontario and Federated Malay States no enactment with respect to warranty of title that expressly covers the case of a person registered otherwise than on an initial application, on transfer for value from a registered owner, or in consequence of the death

[5] British Honduras R. S. 1914, c. 53 "Bankruptcy," s. 47. See the English Act, Bankruptcy Act 1914 (c. 59), s. 53. The order of adjudication itself is not registrable: *In re Calcott and Elvin's Cont.* [1898] 2 Ch. 460. But see note 24 *post.*

[6] See s. 325 of the Selangor Civil Procedure Code (1902, No. 13). The Negri Sembilan Code is No. 7 of 1902.

[7] *Chan Gun Lai* v. *Anderson Pole* (1911) Innes F. M. S. 126.

[8] See *Kelly* v. *Doody* (1871) 5 S. A. R. 132; *Ex p. Bettle* (1895) 14 N. Z. R. 129.

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of a registered owner.[9] In British Columbia, North-West Territories, and British Honduras,[10] the enactments are wider, and cover registration generally, however effected.

In the registration statutes of the other seventeen jurisdictions provision is made for the registration of the creditors' representative as owner in place of the debtor. The procedure, whether the system of liquidation be bankruptcy, insolvency, or creditors' assignment, is much the same so far as the registration statutes are concerned, and is referred to in those statutes as "transmission." Each statute has of course been drafted in view of the general law prevailing in that particular jurisdiction, and this determines the nomenclature in the registration statutes. Thus, bankruptcy and insolvency are referred to in Ireland, New South Wales, Tasmania, and Western Australia;[11] bankruptcy in England, New Zealand, Fiji, Trinidad-Tobago, and Jamaica;[12] insolvency in Queensland, Victoria, and Papua;[13] insolvency and assignment in South Australia;[14] bankruptcy and assignment in Leeward Islands;[15] assignment in Manitoba, Saskatchewan, and Alberta.[16] Liquidation by arrangement is also referred to in the English, Irish, Fiji, and Leeward Islands enactments.

The method of registration resembles somewhat that prescribed on initial registration. In some jurisdictions a formal application is necessary; but in every case an application is in effect required to be made by the creditor's representative that he shall be registered as owner in place of the debtor, and evidence of his title to be so registered must be produced. Most of the statutes enact that the creditors' representative shall be "entitled to be registered" as owner in place of the debtor "upon the bankruptcy," &c. occur-

[9] On. 1914, ss. 10, 42, 59. F. M. S. 1911, ss. 8, 67; but see and consider the definition of "transmission" in s. 2, as including the passing of land "by operation of law."

[10] B. C. 1911, ss. 22, 25A, 25B; Can. 1906, ss. 72, 73, 142; B. H. 1914, s. 30.

[11] I. 1891, s. 76; 1910 O. 11; Bro. & Gl. 182, 183. N. S. W. 1900, ss. 3, 54, 90, 91. Tas. 1862, ss. 3, 48, 76, 77. W. A. 1893, ss. 97, 98, 102, 234, 235. Aust. Torr. Syst. 990-995.

[12] Eng. 1875, ss. 43, 46, 47; 1903-8 Rules, rr. 193-200; Own. & Inc. 241, 242. N. Z. 1915, ss. 2, 123, 124, 126-128. Fi. 1876 (1906), ss. 2, 56, 85-89. Tr. 1902, ss. 2, 70, 96, 97. J. 1888, ss. 76, 77, 103. Aust. Torr. Syst., *supra*.

[13] Q. 1861, ss. 3, 54, 55, 86; 1877, s. 34. V. 1915, ss. 137, 138, 142, 275, 276. P. 1913, ss. 5, 44, 93, 94. Aust. Torr. Syst., *supra*.

[14] S. A. 1886, ss. 3, 123, 170-174, 180; Aust. Torr. Syst., *supra*.

[15] L. Is. 1886 (1914), ss. 31-33.

[16] M. 1913, ss. 2, 129; Sas. 1917, s. 147; Al. 1906, s. 83A. Can. Torr. Syst. 269-271.

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ring; some either confer the right to be registered when the land on bankruptcy, &c. "vests in" the creditors' representative, or speak of the creditors' representative acquiring title to the land by the bankruptcy, &c.[17] But the particular form of the enactment seems immaterial, and the meaning in every jurisdiction seems to be the same, viz. that the bankruptcy, &c. of the registered owner does not confer on the creditors' representative the complete legal ownership of the land, but only the right to have this legal ownership by being placed on the register.

The general vesting effect of the bankruptcy, &c. thus seems to be restricted in the case of registered land by the special provisions of the registration statutes. This principle has been acted on in New Zealand,[18] and in Jamaica,[19] and also (though perhaps carried too far) in Federated Malay States.[20] The same principle is implied in the statutes of Victoria and Western Australia,[21] which enact that, pending proceedings by the creditors' representative, the registered owner may deal with the land without being affected by the bankruptcy, &c.[22] In Saskatchewan the general statute relating to creditors' assignments contains an enactment similar to those in Ontario and British Columbia, making assignments "subject . . . as regards lands to the provisions of the" registration statute.[23] The same rule would seem to apply in other jurisdictions, viz. that the order of adjudication, &c. does not fully vest the bankrupt's registered land in the creditors' representative, but that the latter must be registered in place of the debtor in order to take over all his legal ownership.[24] In Ireland special provision is made

[17] See I. 1891, s. 76; J. 1888, s. 103; Q. 1861, s. 86; L. Is. 1886 (1914), s. 31; N. Z. 1915, s. 2 (def. "transmission" as "acquirement of title consequent on . . bankruptcy").

[18] *Messiter* v. *Wollerman* (1907) 27 N. Z. R. 589.

[19] *Alexander* v. *Simpson* (1903) Jamaica, unreported.

[20] *Chan Gun Lai* v. *Anderson Pole* (1911) Innes F. M. S. 126. So far as it is sound this case would be an à fortiori authority elsewhere, since nothing is said in the F. M. S. 1911 of transmission by insolvency.

[21] V. 1915, s. 276; W. A. 1893, s. 235. The Victorian Insolvency Act 1915 (No. 2671) also enacts that "... Nothing in this Act shall limit the effect of the express provisions of the Transfer of Land Act 1915."

[22] *In re Palmateer* (1890) 16 V. L. R. 793; *Equity Trustees Co.* v. *Aynsley* (1900) 26 V. L. R. 625, 632, 634; *Graham* v. *Jones* [1905] V. L. R. 645.

[23] Saskatchewan R. S. 1909, c. 142, s. 7. By s. 13 the assignment is to be registered in a land titles office. This statute is referred to in *Re Brooks* (1909) 12 West. R. 303 (Sas.), and *Leach* v. *Haultain* (1913) 24 West. R. 154 (Sas.).

[24] It was expressly said in New Zealand (*Messiter* v. *Wollerman*, *supra*) that the English case of *In re Calcott and Elvin's Cont.* [1898] 2 Ch. 460, had no application. This case related to unregistered land, and is referred to in note 5 *ante*, p. 352.

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for the protection of bonâ fide transactions prior to entry of bankruptcy proceedings on the register.[25] In England the creditors' representative is only entitled to be registered on the proper court certifying "that the land or charge is part of the property of the bankrupt divisible among his creditors."[26]

The property in respect of which the creditors' representative may be registered is referred to in the statutes of England and Ireland (and also in the statutory rule of Ontario) as "land or charge," no mention being made of leases. So in Manitoba, Saskatchewan, Alberta, and Leeward Islands, the reference is to "land, mortgage, or incumbrance," and no mention is made of leases. Leases are not registrable in England, Ireland, and Ontario like other interests, but it can hardly be doubted that in Manitoba, Saskatchewan, Alberta, and Leeward Islands, a registered lease could be made the subject of transmission on bankruptcy, &c.

In other jurisdictions leases are included (expressly or impliedly) in the interests transmissible on bankruptcy, and are also the subject of special enactments. Mortgages are also included, but (except in Leeward Islands[27]) they only form the subject of separate enactment when mortgaged leases are spoken of.

In Queensland and Papua[28] the statutes say nothing about an insolvent's lease being mortgaged, but merely provide that the creditors' representative may disclaim the lease. In New South Wales, Tasmania, and New Zealand,[29] the statutes refer only to such leases as are mortgaged, and provide that if the creditors' representative does disclaim the mortgagee may have the lease vested in himself as if on foreclosure or sale, and if the mortgagee also disclaims the lessor may have the lease surrendered. So in Victoria, Western Australia, and Jamaica,[30] except that the only case provided for is that of a lease "subject to one mortgage only, or to several mortgages if owned by the same person." In South Australia, Fiji, and Trinidad-Tobago,[31] the cases of a lease being mortgaged and free from mortgage are both provided for; whether mortgaged or not, the lease may be disclaimed by the creditors' representative, and if mortgaged the mortgagee and lessor may successively claim, as in other jurisdictions.

The statutes in Victoria and Western Australia[32] make plain what is perhaps implied in other jurisdictions, viz. that the credi-

[25] I. 1891, s. 76 (2).
[26] Eng. 1875, s. 43.
[27] L. Is. 1886.(1914), s. 33.
[28] Q. 1861, s. 55; P. 1913, s. 44.
[29] N. S. W. 1900, s. 91; Tas. 1862, s. 77; N. Z. 1915, ss. 126-128.
[30] V. 1915, s. 137; W. A. 1893, s. 97; J. 1888, s. 76.
[31] S. A. 1886, s. 173; Fi. 1876 (1906), ss. 86-88; Tr. 1902, s. 97.
[32] V. 1915, s. 275; W. A. 1893, s. 234.

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tors' representative is entitled to be registered in respect of interests acquired by the debtor during the bankruptcy, &c.

Occasionally a creditors' representative may find it necessary to get in the debtor's registered ownership by means of a vesting order under the Trustee Acts.[33]

On registration the creditors' representative becomes the registered owner of the debtor's land or interest, and has so much of the benefit of the statutory warranty of title as is consistent with his position. This position is expressly defined in most jurisdictions, but apart from any such definition a creditor's representative is a trustee and a volunteer, and takes the property subject to the equities on which the debtor held it.[34] In Ireland and Leeward Islands the registration statutes say nothing explicitly as to the creditors' representative taking the registered ownership subject to any equities. In Manitoba, Saskatchewan, and Alberta,[35] there is a necessary implication that the creditors' representative is a mere trustee, though absolute owner for the purpose of conferring title on a purchaser.

In England the person registered in place of a bankrupt owner holds the property subject to unregistered interests, but for the purpose of registered dealings as though he had taken it "under a transfer for a valuable consideration."[36] In the remaining jurisdictions—the nine Australasian, Trinidad-Tobago, and Jamaica[37]—the creditors' representative holds subject to trusts and equities, but for purposes of dealing with the land as though he were absolute owner. Thus, property vested in the bankrupt registered owner as a trustee will not be property in respect of which the creditors' representative is entitled to be registered, though this is more explicitly stated in the statutes of England, Queensland, and Papua[38] than elsewhere. The decision under the Federated Malay States statute on this point would hardly be possible in England, New South Wales, &c., under similar circumstances.[39] In the

[33] An illustration is *Re Winter Veale & Co.* (1881) 1 Q. L. J. 143.

[34] *Giles* v. *Lesser* (1879) 5 V. L. R. 38; *In re Nathan* (1863) 1 S. A. R. 166; *Macdonald (John) & Co.* v. *Tew* (1914) 32 O. L. R. 262. The English cases are cited in Innes F. M. S. 133.

[35] M. 1913, s. 129; Sas. 1917, s. 147; Al. 1906, s. 83A.

[36] Eng. 1875, s. 46; Own. & Inc. 241.

[37] N. S. W. 1900, s. 90 (3); Q. 861, s. 86; S. A. 1886, s. 180; Tas. 1862, s. 76; V. 1915, s. 275; W. A. 1893, s. 234; P. 1913, s. 93; N. Z. 1915, ss. 2 (def. "transmission"), 124 (2); Fi. 1876 (1906), s. 89; Tr. 1902, s. 96; J. 1888, s. 103. See Aust. Torr. Syst. 993, where the statement about New Zealand statutes is no longer in point, these having now been amended so as to bring them into line with other Australasian statutes.

[38] Eng. 1875, s. 43; Q. 1861, s. 86; P. 1913, s. 93.

[39] See *Chan Gun Lai* v. *Anderson Pole* (1911) Innes F. M. S. 126, 133.

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event, however, of the creditors' representative being actually registered as owner of any land previously vested in the bankrupt, it seems clear that a bonâ fide purchaser would, on registering his transfer, acquire a fully warranted title.[40]

In Queensland and Papua [41] provision is made for registering notice of annulment of insolvency, and this has the effect of re-vesting in the insolvent any land not disposed of by the creditors' representative. In Ireland also notice of annulment of bankruptcy may be registered, but no re-vesting effect is given to this, and apparently the creditors' representative, if already registered as owner, would have to transfer to the person whose bankruptcy had been annulled.[42] In other jurisdictions it would also be necessary for formal transfers by a creditors' representative to be executed and registered when once he had been registered as owner. In Victoria and Western Australia [43] special provision is made for removing from the register any notification of the rights of a creditors' representative when these appear by way of incumbrance only, but in most jurisdictions any such incumbrance would probably be in the form of a caveat or caution, and this could be removed in the usual way.

With respect to companies in liquidation, in England provision is made for registering the resolution or order appointing a liquidator.[44] This of course does not effect any alteration in the ordinary rule of law, under which the liquidator takes no estate in the company's property, but merely takes over the powers of the directors. In Tasmania, however, it is specially enacted that upon the winding up of a company incorporated under the Companies Acts the liquidators are entitled to be registered as owners of the company's land, &c.,[45] just as though they were the creditors' representatives in a bankrupt estate.

SUB-SECTION 2—JUDGMENTS AND EXECUTIONS.

Creditors' rights under judgments and executions may be enforced against registered land the property of a debtor, just as rights under bankruptcy, &c., may be enforced. As in the case of bankruptcy, &c., the positive and substantive rules of law on the subject, under which the judgment creditor is secured in his right to make the debtor's land available for satisfaction

[40] Own. & Inc. 241; Aust. Torr. Syst. 919, 993; *ante*, p. 97.
[41] Q. 1877, s. 34; P. 1913, s. 94.
[42] I. 1891, s. 76 (3); Bro. & Gl. 183.
[43] V. 1915, s. 229; W. A. 1893, s. 184.
[44] Eng. 1903-8 Rules, r. 200. [45] Tas. 1886, s. 31.

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of his claim, are for the most part to be found elsewhere than in the registration statutes.[1] The latter usually enact only how the right thus secured under the general law is to be enforced against registered land. In some jurisdictions the rights conferred by a general statute are expressly made "subject to the provisions of" the registration statutes.[2]

In contrast to the case of bankruptcy, &c., the judgment debtor remains on the register as owner, but the judgment or execution may be made a charge or quasi-charge on the land by appropriate procedure, and the registered ownership is only altered when proceedings have been taken to realize the charge by sale; the purchaser of the debtor's interest is then registered as owner in place of the debtor. These general observations appear to apply to all jurisdictions. There are, however, three in which the registration statutes themselves are silent on the subject: England, New Zealand, British Honduras. New Zealand is substantially brought into line with other Australasian jurisdictions by provision being made in the Supreme Court rules for registration of charging orders;[3] in England a judgment creditor may enter a caution, but this seems to be the only reference to the subject in the statutes or rules.[4] Thus, in England and British Honduras the statute law on the subject is to be found outside the registration statutes.

As in the case of bankruptcy, &c., it seems correct on the whole to say that transactions by the debtor himself are valid so long as the register shews nothing of the judgment or execution, and that a duly registered purchaser from the sheriff or other official vendor is also protected against equitable interests of which the purchaser has no notice.[5]

Neither statutes nor judicial decisions are uniform with regard

[1] Occasionally difficulties have arisen in determining what the substantive rights of judgment creditors are with respect to registered land: see *Seay* v. *Summerville Hardware Co.* [1917] 1 W. W. R. 1497 (Al.).

[2] For instance, in Ontario: Execution Act (R. S. 1914, c. 80), s. 10.

[3] Rules 314-321; see Hutch. 122.

[4] Eng. 1875, s. 53. See Own. & Inc. 129, 344; Br. & Sh. 37. Proceedings must be taken under the Land Charges Registration Acts 1888 and 1900.

[5] In *Robertson* v. *Keith* (1870, 1 V. R. 11) the sheriff's transferee would have been protected but for the land being in the possession of a tenant. There are dicta as to the protection of a registered purchaser in other cases: *National Bank* v. *Morrow* (1887) 3 V. L. R. 2; *Jellett* v. *Wilkie* (1896) 26 Can. S. C. R. 282; *In re Broughton* (1916) 17 S. R. (N. S. W.) 29. This principle has been acted on under systems of deed registration, which is of course à fortiori in favour of its application to registration of title: see *Silva* v. *Hamey* (1883) Wendt's Ceylon R. 383; *Chia Guan Chip* v. *Dunlop* (1901) 6 Str. Sett. R. 98. Both these cases are stated in Hogg's Deeds Reg. in Australasia, 125.

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to the rights of a judgment creditor over registered land in which his debtor has an interest. In some jurisdictions judgments or executions are filed for registration and placed in a special book or sub-register, in others they are notified in the main register; but the filing at the registry, and not the noting subsequently in the register, is the important part of the procedure.[6] Notwithstanding the essential difference (in theory and with respect to ordinary instruments) between actual registration and mere notification or entry on the register, there appears to be no substantial difference in the rights conferred with respect to judgments or executions; and since the rights of the judgment creditor are also the same, whether it be the judgment or an execution under the judgment that is registered, no distinction between judgment and execution, or between registration and mere entry, need be dealt upon for the present purpose.

In Ontario, Manitoba, Alberta, North-West Territories, New South Wales, South Australia, Tasmania, Victoria, Fiji, Jamaica, and Federated Malay States,[7] the statutes are substantially (though by no means verbally) uniform, and the case law is also fairly uniform. One difference is that in Manitoba, Alberta, and North-West Territories the judgment or execution is registered independently of the main register, and without regard to the fact that the debtor may not be the registered owner of any land; his registered interest thus becomes bound whenever it comes into existence. In other jurisdictions the judgment or execution cannot be registered unless there is some land registered in the name of the debtor against which to register it.[8]

All these statutes enact in effect: (1) That registered land is "bound" when, and not until, the judgment or execution is registered or entered on the register; (2) That on production (usually within a stated time after the registration of the judgment or execution) of a transfer from the sheriff or other officer to a purchaser of the land, and on compliance with ordinary formalities of registration, the purchaser may be registered as owner. With

[6] *Lee* v. *Harrison* [1917] 3 W. W. R. 570 (Al.), affd. *Lee* v. *Armstrong*, *ib.* 889.

[7] On. 1914, ss. 62-65, and 1911 Rules, r. 32; M. 1913, ss. 78, 93, 95; Al. 1906, ss. 43, 77-81; Can. 1906 ss. 73, 124-129; N. S. W. 1900, s. 105; S. A. 1886, ss. 105-110; Tas. 1862, s. 94, and 1893, s. 17; V. 1915, ss. 178, 229, 230; Fi. 1876 (1906), s. 91; J. 1888, s. 102; F. M. S. 1911, s. 68. New Zealand must also be included: Sup. Ct. Rules, rr. 314-321. And see Aust. Torr. Syst. 983-988; Can. Torr. Syst. 51, 256-269.

[8] Aust. Torr. Syst. 987, cases in note 24; Can. Torr. Syst. 262; *Lee* v. *Armstrong, supra; Robin Hood Mills* v. *Harrison* [1918] 2 W. W. R. 58 (Al.).

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respect to these enactments it has been decided: (1) That the law as settled by *Eyre* v. *McDowell*[9]—only the debtor's beneficial interest is charged, and no priority over existing unregistered interests is gained by registration of the judgment—has not been altered when registered land is in question, and that the lien or charge created by registration of the judgment or execution is subject to unregistered rights and interests already created by the debtor in favour of other persons; (2) That if the purchaser from the sheriff becomes duly registered, the register may be conclusive and his registered title free from the unregistered interests created by the debtor, but unless actually registered the transfer of the purchaser is liable to be postponed to unregistered interests created prior to the registration of the judgment or execution. These propositions seem to sum up the law as now laid down authoritatively both in Australia and Canada.[10] The same principle, that until actual registration of the purchaser the holder of an unregistered interest may take steps to assert his prior rights, also applies in cases of sale of land for unpaid rates and taxes.[11] Occasionally an equitable interest created before registration, and while the land is not bound by an execution, will be postponed to the right of an unregistered purchaser from the sheriff.[12]

The registration of the judgment or execution does not confer a "proprietary" right,[13] but "operates as a caveat" against transactions by the debtor,[14] and some of the statutes state this expressly; there is however no difference in construction on this point between enactments (such as those of South Australia, Fiji, and Federated

[9] (1861) 9 H. L. C. 619. The law of judgment—mortgages in Ireland must be examined in order to appreciate the true bearing of this case, and may be found in Madden's Reg. Deeds: see particularly pp. 86, 90, 94. 108. *Eyre* v. *McDowell* was not decided with reference to registered land, but under the Irish Deeds Registration Acts; perhaps its applicability to registered land will have to be reconsidered in a final appeal court: see *Pim* v. *Coyle* [1907] 1 I. R. 330; ante, p. 114.

[10] See *Robertson* v. *Keith* (1870) 1 V. R. 11; *National Bank* v. *Morrow* (1887) 13 V. L. R. 2; Aust. Torr. Syst. 986; *In re Broughton* (1916) 17 S. R. (N. S. W.) 29; *Jellett* v. *Wilkie* (1896) 26 Can. S. C. R. 282, follg. *National Bank* v. *Morrow; Re Brooks* (1909) 12 West. R. 305 (Sas., before the 1912-13, c. 16, s. 17); *Merchants Bank of Canada* v. *Price* (1914) 27 West. R. 48 (Al.); *Bain* v. *Pitfield* (1916) 33 West. R. 681 (Man.). Some cases to the contrary are noticed further on.

[11] *In re Church's Caveat* [1905] S. R. Q. 201; *Watson* v. *Registrar of Titles* (1904) 7 W. A. R. 45; *In re Edwards* (1908) 10 W. A. R. 144.

[12] *In re Hodgson* (1899) 25 V. L. R. 355.

[13] *Bond* v. *McClay* [1903] S. R. Q. 1; the form of the Queensland enactments makes this case applicable à fortiori.

[14] *In re Bosquet* (1883) 17 S. A. R. 181.

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Malay States) which expressly make the registration operate merely as a caveat, and those that do not.[15]

When land is held by the registered owner in a representative capacity, an execution against him in his individual character cannot be registered against the land; but an execution against the person whom he represents may be registered against the land of which the representative is the registered owner.[16]

Although it is only the beneficial—and not the merely legal—interest of a registered owner that can be affected by registration of a judgment or execution,[17] and although the interest of the debtor cannot be so affected while remaining a merely unregistered interest, it has been considered doubtful whether the interest of a registered owner as unpaid vendor of the land can be made available for the judgment creditor who has registered his judgment or execution.[18] This doubt has, in Alberta, been set at rest by an amending statute expressly making such an interest available,[19] and the balance of judicial authority in other jurisdictions is in accordance with the Alberta statute law.

In Queensland, Papua, and Leeward Islands,[20] the enactments are to the same effect as the majority of those already referred to, but make additional provision regarding the interest to be taken by a purchaser from the sheriff. The purchaser's transfer is to be "subject to all equitable mortgages and liens notified by any caveat . . . prior to the registration of the writ of execution" (in Leeward Islands "order of sale"). This however will not prevent an unregistered interest (other than an "equitable mortgage" or a "lien") previously in existence being set up against the purchaser at any time before his transfer is registered,[21] so that in these three jurisdictions a purchaser from the sheriff, &c. can only rely

[15] *Sawyer and Massey Co.* v. *Waddell* (1904) 6 Terr. R. 45. *Jellett* v. *Wilkie* (*supra*) was decided under a repealed statute (Territories Real Property Act, R. S. Can. 1886, c. 51, s. 94) making the quasi-registration of the writ "operate as a caveat," now omitted from Can. 1906, s. 124.

[16] *Balding* v. *Nicholas* (1893) 19 V. L. R. 110; *Reg.* v. *Bourne, Ex p. Spresser* (1897) 8 Q. L. J. 14.

[17] Illustrated also in sale for taxes: *In re Edwards* (1908) 10 W. A. R. 144.

[18] See *Robinson* v. *Moffat* (1916) 37 O. L. R. 52; *Traunweiser* v. *Johnson* (1915) 31 West. R. 712 (Al.); *Adanac Oil Co.* v. *Stocks* (1916) 33 West. R. 864 (Al.); *Seay* v. *Summerville Hardware Co.* [1917] 1 W. W. R. 1497 (Al.). So also a Saskatchewan case cited further on: *Weidman* v. *McClary Manuf. Co.* [1917] 2 W. W. R. 210.

[19] Stat. L. Am. Act 1917 (c. 3), s. 40, embodied in Al. 1906, s. 77.

[20] Q. 1861, s. 91, and 1877, s. 35; P. 1913, s. 112; L. Is. 1886 (1914), ss. 106-110.

[21] *Bond* v. *McClay* [1903] S. R. Q. 1. *Eyre* v. *McDowell* was there held to be applicable, just as in New South Wales, &c.

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on taking the whole registered interest of the debtor if he succeeds in getting his transfer registered—just as in the majority of jurisdictions already referred to.

In Western Australia [22] also additional provision is made with respect to the interest taken by a purchaser from the sheriff, the enactments otherwise following the general Australian model. Unregistered interests are not to "prevail against a sale by the sheriff" unless a caveat has been filed before the registration of the execution; "in the absence of a caveat" unregistered interests are extinguished, and these, as well as the debtor's registered interest, pass to the purchaser on registration of his transfer. This enactment is only intended to protect a purchaser from the sheriff, and only operates as such protection in case a sale is made; rights under unregistered interests can still be asserted at any time before sale.[23]

In British Columbia and Saskatchewan [24] the plan has been adopted of making the judgment (in the former) and the execution (in the latter), when registered, "a lien or charge on all the lands of" the debtor, and (in British Columbia) as though "charged in writing by the" debtor "under his hand and seal." These provisions as to "charge" are in British Columbia contained in a general statute, but in Saskatchewan in the registration statute itself.[25] It is further provided in British Columbia— in the registration statute itself (s. 137)—that the registered judgment ceases to be a charge on the land unless after due notice a lis pendens is registered by the creditor. In Saskatchewan the registered execution binds even lands exempt from seizure, though these cannot be sold by the sheriff; and an order or judgment for alimony also binds land as though a charge of a life annuity had been registered.[26]

Under these enactments the "lands" of the debtor include a mortgage, and judgments and execution may accordingly be registered so as to be a charge on the interest of a mortgagee.[27] "Lands" does not mean merely "lands registered in the name of the" debtor, but beneficial interests in land.[28] Though registration

[22] W. A. 1893, s. 133; 1909, s. 14. See Aust. Torr. Syst. 985.

[23] *Clarke* v. *Roe* (1899) 1 W. A. R. 123 (diss. Onslow C. J.).

[24] B. C. 1911, ss. 22 (1) (*g*), 137-139, 148, 153-156; Sas. 1917, ss. 60 (*e*), 149-153.

[25] British Columbia—Execution Act (R. S. 1911, c. 79), s. 27; Sas. 1917, s. 149 (2). [26] Sas. 1917, ss. 103, 149 (2).

[27] *Re Mandeville* [1917] 1 W. W. R. 1522 (B. C.).

[28] *Entwisle* v. *Lenz* (1908) 9 West. R. 17, 317 (B. C.); *Gregory* v. *Princeton Collieries* [1918] 1 W. W. R. 265 (B. C.); *Ruttle* v. *Rowe* [1919] 2 W. W. R. 706 (Sas.).

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of the judgment or execution has been held to be equivalent in its effect to the creation of an equitable mortgage,[29] there are conflicting decisions as to whether it takes priority over an unregistered or later registered mortgage.[30] The case of a transfer has been distinguished from that of a mortgage, and the unregistered transfer held to have priority over the registered judgment or execution.[31]

In the above cited cases there are two opposing tendencies of judicial opinion, one in the direction of following the principle of *Eyre* v. *McDowell* (*supra,* p. 360), the other inclined to treat the registered judgment or execution as an actual charge on the land taking priority, by virtue of the registration statutes, over unregistered interests.

In Ireland and Trinidad-Tobago [32] the enactments do not differ in substance (though the Irish enactments are quite different in form) from those of the statutes in other jurisdictions such as Ontario and New South Wales, but the principle of *Eyre* v. *McDowell* (*supra,* p. 360) has in effect been disregarded in favour of the view that the provisions of the registration statutes govern. Thus, in both these jurisdictions a registered judgment has been held to confer priority of interest over unregistered assurances (not mere mortgages).[33] The principle adopted in these cases is that the unregistered assurance passes nothing, and therefore leaves the whole interest shewn on the face of the register to be affected by the registered judgment (*ante,* p. 114). This principle has been acted on under a system of deed registration.[34]

An order of court for land to be sold or mortgaged would seem to be registrable and to operate as a caveat.[35]

[29] *Weidman* v. *McClary Manuf. Co.* [1917] 2 W. W. R. 210 (Sas.).

[30] *Yarkshire Guarantee Securities Corp.* v. *Edmands* (1900) 7 B. C. R. 348, and *Gregory* v. *Princetan Collieries, supra* (unregistered mortgage held prior); *Union Bank of Canada* v. *Lumsden Milling Co.* (1915) 31 West. R. 801 (Sas.), and *Bank of Hamilton* v. *Hartery* (1919) 58 Can. S. C. R. 338 (judgment registered first held prior to subsequently registered mortgage of earlier date, and *Yorkshire Guarantee* v. *Edmands* overruled.

[31] *Schlasser* v. *Calonial Invest. Co.* [1917] 1 W. W. R. 1045 (Sas.); *Weidman* v. *McClary Manuf. Co., supra; Rogers Lumber Yards* v. *Stuart* [1917] 3 W. W. R. 1090 (Sas.).

[32] I. 1891, ss. 21, 39, 45, and 1910 O. 4, rr. 16, 21; Tr. 1902, ss. 92, 93.

[33] *Pim* v. *Cayle* [1907] 1 I. R. 330; *Seecharan* v. *Judge Maraj* (1909) 1 Tr. & Tob. 344. Some cases in Canada to the same effect must be considered as now overruled in their own jurisdictions: see *Re Herbert and Gibson* (1889) 6 Man. R. 191; *Re Massey and Gibson* (1890) 7 Man. R. 172; *Re Rivers* (1893) 1 Terr. R. 464.

[34] *Alagappa Chitty* v. *Vanjaar Madahsar* (1907) 10 Str. Sett. R. 107.

[35] An order for an infant's land to be mortgaged has been held to be unregistrable: *In re Marchan,* Tr. and Tob. Gaz. 30 Jan. 1919. *Sed. qu.*

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SECTION 2—VESTING ORDERS.

When the right to the registered ownership passes to a person other than the registered owner for the time being, the necessary change in the register is sometimes made on production of an instrument or evidence of title other than a statutory or registrable instrument executed by the registered owner. The most usual occasion is the impossibility or difficulty of obtaining the execution of an instrument by the person whose name is on the register, and the most usual evidence of the right to the registered ownership being in another person is a vesting order or similar instrument made by competent authority. Such a change in the register is not, properly speaking, rectification—which implies the existence of a mistake; however, such alterations of the register as are here referred to are sometimes included in the expression "rectification," and in some jurisdictions the statutes do not clearly distinguish between rectification and alteration.

In England one section in the statutes covers both alteration and rectification, as regards the authority conferred on the court, and the word "rectify" seems to apply to every kind of change in the register that is made directly in pursuance of the court's order.[1] A separate authority is conferred by statutory rule on the registrar to make necessary alterations of the register when "the power of disposing of" the land or charge has "become vested in some person other than the registered proprietor" under "any statute or statutory power" or "order of court" or "paramount title."[2] The registrar has also authority to notify on the register the determination of leases, whether merely noted as leases or registered as leasehold land, and in the latter case "the leasehold title may be closed."[3]

In Ireland, on "the defeasance of the estate of a registered owner" under various circumstances, including "a power of appointment" and "a vesting order," the person entitled to be registered may apply for such registration and be registered accordingly: these provisions apply also to leasehold land, but nothing is said about ordinary leases when merely registered as burdens.[4]

[1] Eng. 1875, s. 95.

[2] Eng. 1903-8 Rules, rr. 151, 174. The relevant sections of the statute and the statutory rules are printed together in Own. & Inc. 381, 382, And see Own. & Inc. 242-245.

[3] Eng. 1875, s. 20; 1903-8 Rules, rr. 218-222; Br. & Sh. 442; Own. & Inc. 46.

[4] I. 1891, ss. 39, 43, 53; 1910 O. 4, rr. 14, 15. Rectification proper is dealt with in a separate section: I. 1891, s. 34.

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In Ontario, there are provisions in both statute and rules answering, though not in detail, to the English provisions for noting the determination of leases, both when merely noted and when registered as leasehold land; the only relevant provision covering the case of vesting orders is an enactment corresponding with the English enactment on rectification generally.[5]

In England, Ireland, and Ontario, the registered interest of which the ownership is thus to be altered is referred to as "land or charge," leases being dealt with separately. The Irish statute expressly mentions "vesting order," and in both England and Ireland a vesting order in an applicant's favour would be sufficient evidence of his right to be registered in place of the existing owner; but apparently in Ontario this would be so only if the vesting order contained a specific direction for alteration of the register. The English rule (r. 151) refers by implication to vesting declarations under the Trustee Acts; in Ireland and Ontario the production of such a declaration would not seem to justify an alteration of the register unless accompanied by an order of the court.

The power of making vesting orders for the purpose of having the register altered would extend to such cases as land remaining vested in a corporation at the time of its dissolution.[6] When the land in such a case is leasehold, and the Crown makes no claim, it would be sufficient for the determination of the lease to be noted on the register; in England the "leasehold title" would be closed.[7]

In Fiji and Federated Malay States,[8] when the court has made an order "preferring as proprietor of lands any person other than the registered proprietor," and in New Zealand,[9] "vesting any estate or interest" in any person, the order is to be entered on the register, and has no vesting effect until so entered. The implied reference in the New Zealand statute is of course to orders under the Trustee Acts.

In British Columbia and Leeward Islands there are merely enactments giving the court general power over the register; in British Honduras even this general power is not expressly conferred, though no doubt implied.[10]

[5] On. 1914, ss. 28, 70 (7), 115; (On. 1914, ss. 115-117, are close adaptations of Eng. 1875, ss. 95-97) 1911 Rules, rr. 31, 42.

[6] An Australian case seems to be in point: *Re Clarke and Solomon's Agreement Trusts* (1905) 5 S. R. (N. S. W.) 498.

[7] Eng. 1903-8 Rules, r. 218; *Tuff (C. & C.) Ltd.* v. *Registrar* [1918] W. N. 26.

[8] Fi. 1876 (1906), s. 92; F. M. S. 1911, s. 69.

[9] N. Z. 1915, s. 92.

[10] B. C. 1911, ss. 110-112; L. Is. 1886 (1914), s. 138; B. H. 1914, s. 30 (making the register the foundation of title).

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In Manitoba [11] any "involuntary change of ownership" is included in "transmission," so that an application for registration might be made by the person entitled as in other cases of transmission. The only other relevant enactment is that giving the court general power over the register.

In Saskatchewan, Alberta, and North-West Territories,[12] the court is given general powers over the register, and there is also an enactment in the two latter enabling a beneficiary to obtain an order removing the registered owner who is trustee of the estate of a deceased owner.

In the remaining nine jurisdictions—the seven Australian, with Trinidad-Tobago and Jamaica [13]—enactments provide for vesting orders, when made by the court under the Trustee Acts, being produced at the registry and treated as authority for altering the register by registering as owner the person in whose favour the vesting order is made; until so registered the order has no vesting effect. In Queensland and Papua an order for sale of land is placed on the same footing. In Victoria and Western Australia power to make vesting orders is also conferred on the head of the registry office—the commissioner of titles—though the order can only be made on evidence that would satisfy the court;[14] in Tasmania, Victoria, and Western Australia, special power is conferred on the head of the registry office to make vesting orders in vendor and purchaser cases, where the purchaser has paid the purchase money and taken possession but is unable to get a transfer from the registered owner.

These vesting orders may be made and registered, for the purpose of effecting an alteration in the registered ownership, in two classes of cases. The person claiming the order may be beneficially entitled, and the land is in effect transferred to him as beneficial owner; or the change in the registered ownership is merely a change of trustees, in lieu of a transfer or appointment of a new trustee. There seems to be no enactment in any of the registration statutes now under consideration (New South Wales, &c.) enabling the change of ownership on the register to be effected merely on production of an appointment of new trustees, though in New South Wales the

[11] M. 1913, ss. 2, 58, 128.

[12] Sas. 1917, s. 73; Al. 1906, ss. 76 (2), 116; Can. 1906, ss. 122, 156. The repealed s. 115 of Sas. 1909 does not seem to be reproduced in the present statute.

[13] N. S. W. 1900, s. 86; Q. 1861, s. 83, and 1877, s. 46; S. A. 1886, s. 184; Tas. 1862, s. 112, and 1893, ss. 14, 15; V. 1915, ss. 227, 228; W. A. 1893, ss. 182, 183; P. 1913, ss. 90, 92; Tr. 1902, s. 114; J. 1888, s. 107. See Aust. Torr. Syst. 845-847, 995-999.

[14] *Werner* v. *Boehm* (1890) 16 V. L. R. 73, 81.

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instrument of appointment has in practice been regarded by the registry as sufficient authority for registering the new trustees as owners; Trustee Acts sometimes expressly require the land to be transferred to the new trustees on their appointment.[15]

Though there are several reported cases in which vesting orders have been made for the purpose of placing new trustees on the register as owners, these orders have all been made ex parte or by consent,[16] and doubt has been expressed as to the power of the court to make such vesting orders with respect to registered land.[17] But on principle it seems difficult to distinguish one case of trusteeship from another.

The most usual occasion for a vesting order being made, for the purpose of vesting land in a beneficiary, is when a purchaser has paid the price and taken possession but cannot get a transfer.[18] Orders have also been made where discharge of mortgage could not be obtained,[19] where an executor refused to transfer to the devisee,[20] where a corporation has been dissolved,[21] where the registered owner has been made bankrupt by proceedings in another jurisdiction.[22]

SECTION 3—RECTIFICATION OF REGISTER.

Rectification of the register, though sometimes denoting any alteration, properly means an alteration made in the register for the purpose of putting right an erroneous entry. As a vesting order is only required for the purpose of effecting a change in the registered ownership when a formal transfer cannot be obtained, so rectification is only required when some mistake in the register cannot otherwise be put right. Occasionally, the court, in deciding in

[15] This is so in New South Wales: Trustee Act Amendment Act 1902 (No. 98), s. 5, referred to in *Loxton* v. *Moir* (1904) 18 C. L. R. 360, 376. See Aust. Torr. Syst. 998; Conv. & Prop. L. 132.

[16] *In re Philpott* (1878) 4 V. L. R. 20; *Martin* v. *Martin* (1903) 3 S. R. (N. S. W.) 156; *In re Fink* [1910] V. L. R. 337; *In re Hope's Trusts*, *ib.* 492.

[17] *In re Fink* and *In re Hope's Trusts*, *supra*. In the former the order expressly omitted all reference to the names of the beneficiaries.

[18] Illustrations are: *Ex p. Herring* (1880) 1 N. S. W. Eq. 12; *In re Vaughn* (1893) 14 N. S. W. Eq. 166. Where the purchaser had not the certificate of title in his possession, the order was refused: *Chambers* v. *Bonar* (1867) 1 Q. S. C. R. 160; see Aust. Torr. Syst. 846.

[19] *In re Cain* (1893) 5 Q. L. J. 93.

[20] *In re Paten* (1896) 17 N. S. W. B. 90.

[21] *Re Clarke and Solomon's Agreement Trusts* (1905) 5 S. R. (N. S. W.) 498, referred to in note C *supra*, p. 365.

[22] *Re Greenaway* (1910) 27 W. N. (N. S. W.) 112. With this compare *Ex p. Bettle* (1895) 14 N. Z. R. 129, criticised in Aust. Torr. Syst. 992.

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our of the person who claims rectification, will declare the reg-
red owner a trustee for the claimant, in lieu of ordering the
ister to be actually altered.[1] So the court will sometimes order
registered owner to transfer to the person rightfully entitled,
ead of ordering the existing entries on the register to be can-
ed.[2]

The right to rectification of the register is, so far as it is not
ferred by enactments in the registration statutes themselves,
ed on the general powers exercised by the courts with respect to
egistered land, in pursuance of which mistakes in documents are
right and public officials compelled to do their duty. In the
e of registered land, the right to rectification may be lost through
operation of the leading principle of registration of title—the
clusiveness of the register. The extent and limits of this con-
iveness generally, and as regards "Mistake," are dealt with
e, pp. 94, 129. The right to have the register rectified is con-
d to cases in which the register is not conclusive against the
mant for rectification.

The powers of the courts, as regards rectification, though usu-
assumed to be ample,[3] are necessarily limited by the statutory
clusiveness of the register, and it is the very circumstance of
e limitations existing that has made it desirable in most juris-
ions to provide for the payment of indemnity as an alternative
ectification. Any power of rectifying the register itself neces-
ly extends to registered instruments.[4]

In British Honduras the statute is silent on the subject of recti-
tion, and notwithstanding that no provision is made for in-
nity it would seem that a bonâ fide purchaser would be entitled
ely on the register (when once it had become conclusive), if a
take had been made in his favour and to the detriment of the
on rightfully entitled (apart from the register).[5]

In British Columbia, though powers of correcting the register,

[1] *Macdonald (John) & Co.* v. *Tew* (1914) 32 O. L. R. 262.

[2] See cases cited in Aust. Torr. Syst. 839, note 3; *ib.* 844, note 36.

[3] See *Brond* v. *Bromhall* [1906] 1 K. B. 571 (shipping register); *ctual Executors Assoc.* v. *Hosken* (1912) 14 C. L. R. 286, 291 (manus); *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A. C. 491.

[4] *Cudmore* v. *Cudmore* [1892] S. A. R. 119 (mortgage); *Taitapu Estates* v. *Prowse* [1916] N. Z. R. 825; *Loke Yew* v. *Port Swettenham Rubber Co., supra.*

[5] Cases under the Irish Incumbered Estates Acts support this view: *e* v. *Errington* (1859) 7 H. L. C. 617; *Power* v. *Reeves* (1864) 10 . C. 645; these are referred to in, and the statement in the text suped by, *In re Walsh* [1916] 1 I. R. 40. The register in British duras does not at once become conclusive: B. H. 1914, ss. 14-16.

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&c. are conferred on the registrar, there seems to be no wide general power of rectification expressly given to the court. In all other jurisdictions (except British Honduras) express powers of rectification are conferred by the registration statutes on both registrar and court; but, even when not expressly made subject to the statutory effect of a registered title, this statutory effect impliedly overrides any power of rectification, and must be taken into account in construing the enactments under which the court or registrar act. The statutory effect of registration may also override the court's general and inherent power to rectify erroneous documents.

In England and Ontario [6] the powers of rectification conferred on the court are extremely wide, though expressly made "subject to any estates or rights acquired by registration"; in certain cases, where the register would otherwise be incapable of rectification and the person suffering loss would be entitled to indemnity accordingly, the register may be rectified and the right to indemnity given to the person who thus loses his registered interest. In Ontario special authority is conferred on the registry officers to cancel fraudulent entries, and in England [7] detailed powers of correcting and rectifying the register are conferred by rules on the registrar.

In Ireland [8] the court is expressly empowered to rectify the register on the ground of "actual fraud or mistake"; further power is conferred to rectify by correcting errors in the register where this can be done "without injury to any person"—that is, to a person not a party to the proceedings,[9] or where the mistake is admitted and no question of title arises.[10] What in effect amounts to rectification can sometimes be had under the guise of an application to the registrar to investigate the title to burdens under s. 29 of I. 1891.[11]

In New South Wales, Queensland, Tasmania, Victoria, Western Australia, Papua, New Zealand, Trinidad-Tobago and Jamaica,[12]

[6] Eng. 1875, ss. 95-97; 1897, s. 7 (2). On. 1914, ss. 115-118, 124 (7). See Own. & Inc. 255-263; *ante*, p. 130; *Perry* v. *Vise* (1919) 45 O. L. R. 117.

[7] Eng. 1903-8 Rules, rr. 15-17, 157, 173, 253.

[8] I. 1891, s. 34; 1910 O. 6, r. 6; O. 15, r. 12. See Bro. & Gl. 138-140.

[9] *In re Walsh* [1916] 1 I. R. 40.

[10] *In re Leonard's Estate* [1912] 1 I. R. 212; *In re Hussey's Estate*, *ib.* 473.

[11] *In re Owen Smith* [1918] 1 I. R. 45.

[12] N. S. W. 1909, ss. 12 (d), 136-138; Q. 1861, ss. 11 (4), 124, 130, 132; Tas. 1862, ss. 11 (4), 136-138; V. 1915, ss. 80, 81, 233 (ii), 234, 245; W. A. 1893, ss. 76, 77, 188 (ii), 189, 200; P. 1913, ss. 15 (4), 155-157; N. Z. 1915, ss. 73-78; Tr. 1902, ss. 8 (*d*), 127-129, 136; J. 1888, ss. 11 (ii), 124, 125, 130. And see Aust. Torr. Syst. 842-847.

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the registrar is given power to correct the register and to obtain the aid of the court when necessary, but the only general and independent power expressly conferred on the court is the power to order rectification "upon the recovery of" land, &c. from the registered owner by the person rightfully entitled. The question of procedure, and the precise method of rectification, have been the subject of a number of reported cases in these jurisdictions.[13]

In the remaining eight jurisdictions—South Australia, Fiji, Federated Malay States, Leeward Islands, Manitoba, Saskatchewan, Alberta, North-West Territories [14]—the powers conferred are similar to those in the Australian jurisdictions just referred to, but with the important difference that the court may order rectification "in any proceeding" relating to land, &c. This has been said to give the court "complete control over the register." [15]

Of these jurisdictions Fiji and Federated Malay States stand on a special footing of their own, inasmuch as in them no provision is made for payment of indemnity for loss through registration. In jurisdictions where payment of indemnity is a remedy alternative to rectification, the courts would naturally have less hesitation in rectifying even again a bonâ fide purchaser. In Fiji and Federated Malay States (as in British Honduras) no indemnity for loss is provided for, and it might be that an owner who has been registered by mistake would have to shew a clearer case on the merits in order to resist rectification.

[13] Aust. Torr. Syst. 844; Power, Real Prop. Acts (Q.) 159, 167; Hutch. 91-94.

[14] S. A. 1886, ss. 60-64, 220 (4); Fi. 1876 (1906), ss. 98-100, 108 (5); F. M. S. 1911, ss. 74-76, 79 (*e*); L. Is. 1886 (1914), ss. 140, 141; M. 1913, ss. 55-58; Sas. 1917, ss. 70-73; Al. 1906, ss. 114-116; Can. 1906, ss. 154-156. See Aust. Torr. Syst. 844; Can. Torr. Syst. 199-201.

[15] *In re Martin* [1900] S. A. R. 69, 76, approved by the Privy Council on appeal: *MacEacharn* v. *Colton* [1902] A. C. 104.

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CHAPTER IX—DEATH OF REGISTERED OWNER.

SECTION 1—TRANSMISSIBLE INTERESTS.

The devolution of land and interests in it, at or in consequence of the death of the registered owner, is usually referred to in the registration statutes as "transmission." The subject is treated in considerable detail in some of the text-books relating to various jurisdictions,[1] and principally in connexion with transmissible interests. The word "transmission" is also loosely used to describe change of ownership on mere cesser of interest, such as death of an annuitant, joint owner, owner of life or other limited interest. These cases form the subject of Section 2 *post*. The consequences of the death of a transferor, transferee, or applicant for initial registration, are referred to elsewhere as specially provided for in some jurisdictions. The subject-matter of the present Section is the devolution and transmission on the register to their successors or representatives of the interests of registered owners of the land itself, of leases, and of mortgages or charges.

The general principle is that on the death of the registered owner the interest shewn by the register to have been vested in him cannot be considered as fully and for all purposes vested in anyone until a new owner is duly registered, either as owner in his own right, or as the representative of the deceased owner. This principle is not however worked out in the same way in all jurisdictions. Who are the persons primâ facie entitled to the land in succession to the deceased owner (apart from being placed on the register as owners) is a question that is sometimes governed by the general law as well as the registration statutes. And the persons who would be entitled in succession, apart from registration, are not always entitled to be registered as owners of the interest of the deceased owner. These two matters will be dealt with separately.

In all jurisdictions but three—British Columbia, British Honduras, Leeward Islands—the rule of law by which freehold land passed either to the devisee or the heir, as the owner died testate or intestate with respect to it, has been abrogated wholly or in part. In British Columbia and British Honduras the registration statutes say nothing expressly on the subject. In Leeward Islands,[2] how-

[1] See Own. & Inc. 246-254; Br. & Sh. 252-302; Bro. & Gl. 67-79, 144, 189-201, 239-242. Aust. Torr. Syst. 874, 1000-1021. Can. Torr. Syst. 249-255.

[2] L. Is. 1886 (1914), s. 27.

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ever, it is enacted that, where the registered owner disposes of his land by will, "the land shall transmit to the devisee"; it is assumed, though not enacted, that on intestacy the land passes to the heir.

In Queensland and Tasmania [3] the rule has been only partially abrogated, and freehold land passes to the devisee if devised, but to the personal representative in case of intestacy. In Ireland [4] the rule has only been abrogated so far as concerns registered land conveyed to a purchaser under the Land Purchase Acts, and such freehold land passes on the death of the owner to his personal representative, in cases of testacy and intestacy alike, whilst as regards other land the ordinary law remains in force, and heir or devisee (as the case may be) will take.

In other jurisdictions freehold land passes, whether the owner dies testate or intestate with respect to it, to the personal representative. The method of legislation, as it affects registered land, is not uniform.

In England [5] the enactments are contained in one of the registration statutes, and relate primarily to unregistered land, though registered land is expressly referred to. In Ontario [6] the enactments form part of a general statute, and therefore relate primarily to unregistered land, but include express and detailed provision on the subject of registered land. In Jamaica and Manitoba [7] also the enactments form parts of a general statute, with only incidental references to registered land.

In New South Wales, Victoria, Western Australia, Papua, and New Zealand,[8] the enactments by which freehold land passes to the personal representative are found in general statutes, and no special reference is made in them to registered land.

[3] Queensland—Intestacy Act 1877 (No. 24), ss. 11, 12. Tasmania—Deceased Persons Estates Act 1874 (No. 1), s. 4. And see Aust. Torr. Syst. 1010. It has been held in Queensland that land there does not pass to a personal representative who is so constituted by re-sealing in Queensland letters of administration granted in New South Wales: *In re Heathcote* [1903] S. R. Q. 57; but this seems contrary to the principle enunciated in *Hood* v. *Barrington* (1868) L. R. 6 Eq. 218, 222.

[4] 1891, ss. 83, 84; Bro. & Gl. 189-192. This land is still realty, and not personalty: *Farelly* v. *Farelly* [1918] 1 I. R. 488.

[5] Eng. 1897, ss. 1-5; Br. & Sh. 252-302. Sect. 2 (2) is now amended by s. 12 of the Conv. Act 1911 (c. 37).

[6] Ontario—Devolution of Estates Act (R. S. 1914, c. 119), ss. 3, 13-17.

[7] Jamaica—Real Property Representative Law 1903 (No. 12, almost a transcript of Eng. 1897, ss. 1-5); Real Property Representative Amendment Law 1911 (No. 23); Intestate Estates Law 1905 (No. 18), s. 5. Manitoba—Devolution of Estates Act (R. S. 1913, c. 54), ss. 21, 24.

[8] New South Wales—Wills, Prob. & Admin. Act 1898 (No. 13), s. 44. Victoria—Admin. & Prob. Act 1915 (No. 2611), s. 9. Western Australia—Admin. Act 1903 (No. 13), s. 8. Papua—Prob. & Admin. Ordinance 1913

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In the seven remaining jurisdictions—South Australia, Fiji, Federated Malay States, Trinidad-Tobago, Saskatchewan, Alberta, North-West Territories—and also in Ireland as to the class of land affected, the registration statutes themselves enact that freehold land shall on the death of the registered owner pass to his personal representative.[9] Where, as in Saskatchewan, there are also provisions on the subject in general statutes, the latter are treated as the governing enactments.[10]

Notwithstanding differences in language and method of legislation, the result in all jurisdictions seems to be the same, viz., that whilst the registered owner's interest passes on death to his successor—whether devisee, heir, or personal representative—the interest only vests sub modo and subject to the provisions, express or implied, of the registration statutes. The successor or representative can neither effectually confer title on another, nor exercise all the rights of the deceased owner, until he is himself placed on the register as owner. Occasionally it may be doubtful in whose favour even a sub modo vesting takes place, and in some jurisdictions provision is made for an ad interim vesting in a public official.[11] The right to be constituted formal representative of the deceased owner may depend on whether the property was held by him in trust or beneficially,[12] or whether it was held in his own right or only in a representative capacity, though these questions are more often raised when a duly constituted representative seeks to be registered as owner. It has indeed been held in Australia that the statutes vesting property of a deceased person in the personal representative

(No. 11), s. 14. New Zealand—Admin. Act 1908 (No. 3), ss. 2, 4. See Aust. Torr. Syst. 1009-1014, and for the effect of probate, &c., on the devolution of land, see Conv. & Prop. L. 452-459. In *Union Bank* v. *Harrison* (1910) 11 C. L. R. 492, it was held that land vests in each of several executors, just as personalty does. (The New South Wales Probate Acts of 1890 and 1893, under which *Union Bank* v. *Harrison* was decided, are faithfully reproduced in the Act of 1898 above cited: *Marshall* v. *Smith* (1907) 4 C. L. R. 1617, 1632.)

[9] S. A. 1886, ss. 175, 178; Fi. 1876 (1906), ss. 25-31, 82; F. M. S. 1911, ss. 13-17; Tr. 1902, ss. 100-107; Sas. 1917, s. 140; Al. 1906, s. 74; Can. 1906, ss. 5, 6, 114; I. 1891, ss. 83-89. In Saskatchewan devolution of land is dealt with by the Devolution of Estates Act (R. S. 1909, c. 43), see particularly s. 21. In Alberta similarly see s. 2 of the Transfer and Descent of Land Act (1906, c. 19): the Act is amended by s. 39 and s. 46 of Stat. Law Am. Acts (1917), c. 3, and 1918, c. 4).

[10] *Rex* v. *Tschetter* [1918] 1 W. W. R. 934 (Sas.).

[11] New South Wales—Wills, Prob. & Admin. Act 1898 (No. 13), s. 61; Western Australia—Admin. Act 1903 (No. 13), s. 21; Papua—Prob. and Admin. Act 1913 (No. 11), s. 13. So (as to intestacy only) Queensland—Intestacy Act 1877 (No. 24), s. 11; Tasmania—Probate Act 1893 (No. 14), s. 5. And see Aust. Torr. Syst. 1012.

[12] *In re Cameron* (1880) 6 V. L. R. 1, 87.

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relate only to property held by the deceased in his own right, and do not include property held by him in a representative capacity.[13] This decision would seem to apply in other than Australian jurisdictions, though in some instances provision has been made for such a case in the registration statutes.[14]

The limits of the extent to which the deceased's interest vests in a person who may be entitled to be, but is not yet, registered as owner—whether as true successor or as a mere representative — is best appreciated by reference to the circumstances in decided cases. Thus, an action cannot be brought against a tenant of the deceased.[15] On the other hand, an action for trespass could probably be brought in order to protect the interests of the deceased's estate.[16] And land does so far vest as to prevent any gap in the continuity of the ownership of freehold land between the deceased and his successor.[17] And if land has been the subject of an informal gift, the donee being put in possession, the appointment of the donee as one of the donor's executors completes the donee's title and right to registration.[18] In jurisdictions where land passes to the personal representative a devisee, as such, has no more right to be registered as owner than any other person, until a personal representative has been duly constituted.[19]

Whether heir, devisee, or personal representative, the person (or one of the persons) to whom the land or other interest passes on the death of the owner has a right to be registered in his place. The enactments that confer this right imply by their very terms that, until so placed on the register, the successor is not fully clothed with the property and other rights of the deceased owner. These enactments are in the majority of jurisdictions to be found in the registration statutes only, but there are a few exceptions, of which Queensland and Tasmania are instances.[20]

[13] *Maddock* v. *Registrar of Titles* (1915) 19 C. L. R. 681.

[14] For instance, in England, as to a deceased trustee in bankruptcy: Eng. 1903-8 Rules, r. 192.

[15] *Howie* v. *Barry* (1909) 28 N. Z. R. 681.

[16] *Little* v. *Dardier* (1891) 12 N. S. W. Eq. 319 (before change of law as to passing of land to personal representative).

[17] *In re Campion* [1908] S. A. R. 1.

[18] *Matthews* v. *Matthews* [1913] V. L. R. 80. The donee (who had not proved the will) was held entitled to a transfer from the proving executors, who had become registered owners.

[19] *In re Petersen* (1890) 9 N. Z. R. 538; *In re Allan* [1912] V. L. R. 286.

[20] Queensland—Intestacy Act 1877 (No. 24), s. 25; Tasmania — Deceased Persons Estates Act 1874 (No. 1), s. 10. By these enactments the curator of intestate estates or the administrator is entitled to be registered as owner in place of a deceased person who dies intestate as to

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In British Columbia, British Honduras, and Leeward Islands,[21] the devisee, heir, or personal representative (as the case may be, and according to the nature of the property) is entitled to be registered, and (in British Columbia and Leeward Islands) on registration his title relates back to the death of deceased.[22] In British Honduras, in case of doubt or dispute, some person may be appointed by the court to be registered "as the representative" of the deceased's interest. In British Columbia the application can only be made on production of official evidence of probate or intestacy, and must be made "before the registration of any dealing" with deceased's interest;[23] if the applicant be an executor with merely a power of sale over freehold land, he will not be registered as owner of the land but of a "charge."[24] In all these jurisdictions the application for registration is treated much as an application for initial registration, and proper evidence of applicant's title is required. Provision is made in British Columbia (s. 50), when the registered successor is an "executor, administrator, or trustee," for placing on the register a memorandum that the land is held "on trust" or "upon conditions," &c.

In Ireland,[25] so far as concerns freehold land that has not been conveyed under the Land Purchase Acts, the devisee or heir (as the case may be) is still the person entitled in succession to a deceased owner, and he will be entitled to be placed on the register accordingly. Other registered land passes to the personal representative, both on testacy and intestacy, in the same way as leases and charges. The enactment relating to "transmission" of "land" applies also to "charges," and deals with the cases both of a "limited" and a "full" owner. On the death of a full owner the person to be registered in his place is the person who, on the application of someone interested, may be appointed by the registrar, hav-

his registered land. In Victoria a section, which was a duplicate of what is now V. 1915, s. 232 (formerly V. 1890, s. 193), was inserted in the Admin. & Prob. Act 1890 as s. 12, but is now omitted from the Admin. & Prob. Act 1915; this repealed duplicate section (s. 12) is referred to in *Maddock* v. *Registrar of Titles* (1915) 19 C. L. R. 681, and its appearance in the Admin. & Prob. Act seems to have affected the construction of the section as it stood in the registration statute (V. 1890, s. 193).

[21] B. C. 1911, ss. 2 (def. "transmission"), 50 (am.), 54, 54A; B. H. 1914, ss. 32-35; L. Is. 1886 (1914), ss. 27-29, 33.

[22] As to the effect of this in preventing a "gap" in the continuity of ownership, see a South Australian case: *In re Campion* [1908] S. A. R. 1.

[23] There is a similar provision in the South Australian and other statutes; see preceding note.

[24] *In re Préfontaine* [1917] 1 W. W. R. 667. Compare Tas. 1878, s. 1.

[25] I. 1891, ss. 37, 43, 83-89; 1910 O. 4, rr. 3-13, 15; Bro. & Gl. 144, 189-201. Dower and curtesy in land conveyed under the Land Purchase Acts are abrogated, but not estates tail: *Longworth* v. *Campbell* [1910] 1 I. R. 23.

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ing regard to the rights of other persons. If the land passes to the personal representative, he will be the only person recognized and entitled, and would seem to have the right to be registered accordingly. Charges would pass to the personal representative in all cases. The statute however enables the personal representative to make dispositions of the land, and implies that he need not be actually registered, and this is said to be the practice;[26] whether this applies to "charges" as well as "land" is not clear. Provision is made for the personal representative to hold land as trustee for the persons beneficially entitled, and generally to deal with it as though it were personalty.

In Queensland and Tasmania[27] a distinction is made, in applications for registration in place of a deceased owner, between "land" on the one hand and mortgages and leases on the other, applications in respect of land being assimilated to applications for initial registration, and those in respect of mortgages and leases being more purely formal; in the case of land, the application of the personal representative as the person entitled upon intestacy is again assimilated to applications in respect of mortgages and leases. Thus the devisee is entitled to be registered as owner of freehold land, devised to him, and the personal representative as owner of land not devised and of mortgages and leases. In Tasmania an executor (where freehold land is charged) may be registered as entitled to sell the land, and any person with a power of disposition may be registered as owner. In both jurisdictions the clear intention of the enactments is (though not always well stated) that the new registered owner is for purposes of dealing with the property to be regarded as absolute owner, whilst holding it in trust for others who may be beneficially entitled.

In England and Ontario[28] the statutes draw a distinction, in the procedure for registering an owner in place of a deceased owner, between freehold land on the one hand and leasehold land and charges on the other, but the alteration in the law of succession by which freehold land passes to the personal representative has made this distinction of little importance. In England the more recent rules make the same procedure applicable to both cases. In

[26] I. 1891, s. 84 (3); Bro. & Gl. 192.

[27] Q. 1861, ss. 41, 88, 89; 1877, ss. 32, 33; Intestacy Act 1877 (No. 24), s. 25 (printed in Aust. Torr. Syst. 243). Tas. 1862, ss. 28, 79-81; 1878, s. 1; 1886, ss. 18, 19; Deceased Persons Estates Act 1874 (No. 1), s. 10 (printed in Aust. Torr. Syst. 442).

[28] Eng. 1875, ss. 41, 42, 46, 47; 1897, ss. 1-5, 6 (4, 5); 1903-8 Rules, rr. 183-192. On. 1914, ss. 56-61; 1911 Rules, rr. 39-41; Devolution of Estates Act (R. S. 1914, c. 119), s. 3.

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England it is expressly provided by rule that the proving executor only may be registered as owner, though another executor who proves subsequently may also then be placed on the register.[29] And, apart from this rule, a proving executor now has authority to deal with his testator's land.[30] The English decision cited may still apply in Ontario. It would seem, however, that the land could be effectually dealt with by the persons who were actually registered as owners, and without the concurrence of any non-registered executor being necessary. In Ontario land not disposed of by the personal representative within three years vests in the person beneficially entitled, and the latter may then be registered as owner. In England it is provided by rule that the personal representatives of a deceased trustee in bankruptcy are not to be registered in his place.[31] The same principle would probably be acted on, in England and elsewhere, with respect to a deceased administrator or (in some cases) executor.[32] In both jurisdictions the person registered in place of the deceased owner holds the property in trust for others beneficially entitled, but "as respects any registered dealings" he is in the position of having taken it "under a transfer for a valuable consideration."

In Trinidad-Tobago [33] the provisions of the registration statute as to land passing to the personal representative are adapted from those in England, and there is the same want of complete assimilation between freehold land and chattel interests. As in Ireland, the personal representative need not be actually registered as owner; he may dispose of the land, but nothing is said (herein differing from the English statute) as to being in the position of a transferee for value.

Jamaica and Manitoba each present peculiarities. In Jamaica [34] the registration statute stands unamended, though impliedly altered by the alteration in the general law vesting freehold land in the personal representative. The wide distinction that is drawn in the statute between freehold and other interests does not now actually exist; the application to be registered in respect of freehold land is treated like an application for initial registration, but the mere production of probate, &c. is sufficient in the case of a

[29] Eng. 1903-8 Rules, rr. 183, 184: Own. & Inc. 251, 338.

[30] Conveyancing Act 1911 (c. 37), s. 12, in effect abrogating *In re Pawley and London, &c., Bank* [1900] 1 Ch. 58.

[31] Eng. 1903-8 Rules, r. 192; Own. & Inc. 253.

[32] See the Australian case of *Maddock* v. *Registrar of Titles* (1915) 19 C. L. R. 681, 689, referred to *post*, p. 380.

[33] Tr. 1902, ss. 98-108.

[34] J. 1888, ss. 2, 58, 59, 101; Intestate Estates Law 1905 (No. 18), s. 5. And see note 7, *ante* p. 372.

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"lease, mortgage, or charge." The title of the new registered owner of the "lease, mortgage, or charge" (though not of freehold land) is made to "relate back to" the death of the deceased owner. In all cases the new registered owner holds in trust for others beneficially entitled, but for purposes of dealing with the property he is to be regarded as absolute owner. Provision is also made for the registration as owner of a person in favour of whom the Crown's right of escheat has been waived, though the land may not be disposed of for seven years, within which time the legal personal representative is allowed to establish his title.

In Manitoba [35] the alteration in the law of succession to land has been incorporated in the registration statute, and the latter enacts that on the "transmission" (which includes change of ownership by death) of "any land, mortgage, or incumbrance" (necesarily including leases) application for registration is to be made, "before the registration of any dealing" with the property, by the person entitled; on registration of a personal representative, his title is to "relate back" to the death of the deceased owner. These provisions are to be found in other statutes, but the Manitoba statute is peculiar in providing that the new registered owner, if "an executor, administrator, or trustee under a will," is to be described on the register as such; the will is to be deemed to be embodied in the register, the registered owner is to hold the land upon the trusts to which it is subject, and no dealing is to be registered unless it be in accordance with the trusts.

The provisions in Saskatchewan, Alberta, and North-West Territories,[36] for the registration of the personal representative in place of the deceased owner, are substantially the same as in Manitoba, with one important exception. The new registered owner holds the property subject to the beneficial interests of other persons, but for the purpose of dealing with it he is the absolute owner. The Saskatchewan statute brings "land, or a mortgage, incumbrance, or lease" together for purposes of applying for registration, and special provision is made for the protection of possible interests of infants. In the Alberta and North-West Territories statutes the latter provision is absent, and the right to apply for registration of "land" and of a "mortgage, incumbrance, or lease" is conferred by separate enactments. In Saskatchewan a mortgage may be discharged or transferred without formal transmission being registered. In North-West Territories a special enactment makes

[35] M. 1913, ss. 2, 76, 128.

[36] Sas. 1917, ss. 140-146; Al. 1906, ss. 74-76; Can. 1906, ss. 114-121, 123A.

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a bishop or trustee of a church bodies corporate, and land passes to their successors in office.

New Zealand [37] is the only other jurisdiction in which the provisions for registering the personal representative apply (as in Manitoba and Saskatchewan) without distinction to all interests in land alike. Such applications for registration are the same in procedure, whatever the nature of the interest, and have nothing in common with applications for initial registration. Nothing however is said about any "relation back" of the new registered owner's title. The property is held "subject to all equities," but the registered owner is for the purpose of dealings the absolute owner.

In the remaining seven jurisdictions—New South Wales, South Australia, Victoria, Western Australia, Papua, Fiji, Federated Malay States [38]—the statutes still retain, in differing degrees, traces of the distinction between freehold land and other interests in land, with regard to the procedure for registration of the personal representative as owner. In Victoria and Western Australia the enactments referring to registration of devisees are practically obsolete.[39] In South Australia, Victoria, Western Australia, Fiji, and Federated Malay States, the title of the personal representative relates back on registration to the date of death; in South Australia, Fiji, and Federated Malay States, the personal representative must apply for registration "before dealing" with the interest of the deceased owner. But these latter provisions seem to be of little practical importance, and in some cases apply to the land itself only, and in some to leases and mortgages only. In South Australia only is it enacted, both as to land and all interests in it (therein resembling Manitoba and Saskatchewan), that no dealing is to be effected by the personal representative until he is registered, and that the registration of his title "relates back" to the death of the deceased owner. The intention of all these statutes seems to be that, where there is more than one executor, &c. to whom a grant of probate, &c. is made, all shall apply to be registered as owners, but only in Victoria and Western Australia [40] is there any enactment on this point; in Victoria (both as to land and other interests) and in Western Australia (as to "land" only) every executor or administrator taking a grant must "join and

[37] N. Z. 1915, ss. 2, 123, 124.

[38] N. S. W. 1900, ss. 93-96, 119; S. A. 1886, ss. 175-180, 201; V. 1915, ss. 177, 232, 264, 265; W. A. 1893, ss. 132, 187, 219, 220; P. 1913, ss. 97-100; Fi. 1876 (1906), ss. 82-84, 89; F. M. S. 1911, ss. 64-67.

[39] V. 1915, ss. 264, 265; W. A. 1893, ss. 219, 220; Guest's T. of L. Act, 208, note to V. 1890, s. 225.

[40] V. 1915, ss. 177, 232; W. A. 1893, s. 187.

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concur in every instrument relating to the land." But it is not necessary that an executor who does not take a grant shall become a registered owner, and those who actually do become registered owners have complete control for purposes of disposing of the property.[41] When once registered as owners, the registered title can of course only be affected by means of instruments executed by all the registered owners.[42] In all seven jurisdictions the personal representative, when registered, holds as absolute owner for purposes of disposing of the property, but otherwise subject to the beneficial interests of other persons.

The person who claims the right to be registered as owner in place of the deceased owner may be either a true successor or merely a representative. A successor, properly speaking, is one who is owner in his own right, though he may at the same time be a trustee; a representative is an owner who holds the property in a representative character only, such as official assignees, executors, or administrators.[43] The registration statutes, as interpreted by the courts, distinguish for many purposes between ownership in the registered owner's own right, and ownership in a representative character.[44]

When the right to be registered in place of a deceased owner is claimed, the claim may be dealt with differently according as the deceased was owner in his own right or in a representative character. Thus, if the deceased owner was an administrator who had not fully administered the intestate's estate, an administrator de bonis non will be entitled to be registered as representative of the original intestate;[45] the fees payable will not be those due on an ordinary transmission, the registration being merely a change of representation to the intestate's estate.[46]

The rules relating to the transmissibility of the office of executor and of administrator are applied, just as in the case of personalty, in those jurisdictions where land passes to the personal representative. Thus, on the death of an executor-registered owner, his execu-

[41] *Matthews* v. *Matthews* [1913] V. L. R. 80, where the non-proving executor was rightfully in possession; in Victoria all registration is subject to rights of persons in possession.

[42] This might not be so in the case of unregistered land, which is so far on the footing of personalty as to be capable of being fully disposed of in some jurisdictions by each executor solely: *Union Bank* v. *Harrison, Jones & Devlin* (1910) 11 C. L. R. 492.

[43] See *Maddock* v. *Registrar of Titles* (1915) 19 C. L. R. 681, 689, 691.

[44] *In re Cowan* [1908] S. A. R. 91; *Hosken* v. *Danaher* [1911] V. L. R. 214; *Maddock* v. *Registrar of Titles* (1915) 19 C. L. R. 681; *Blake* v. *Bayne* [1908] A. C. 384.

[45] *In re Cowan, supra.* [46] *In re Cowan, supra.*

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tor will only be registered as owner of land which belonged to the original testator if the deceased executor was the latter's sole executor.[47] And, since the office of administrator is not transmissible, the executor of an administrator-registered owner will not be registered as owner of land which belonged to the intestate, but the adminstrator de bonis non will have to apply to be placed on the register as the intestate's representative.[48] The same principle will govern the case of a deceased official assignee in bankruptcy, and his personal representative will not be registered in his place, his office not being transmissible to his personal representative.[49] An official assignee or trustee in bankruptcy is in fact treated, in this respect, as if he were a corporation sole. Property held by a corporation sole as such does not pass to his personal representative, but to his successor in office, and so if a body of trustees is made a corporation.[50]

In jurisdictions where particulars of beneficial interests are not entered on the register, the right of the personal representative to deal with the property can only be challenged by the registry office under circumstances which raise some suspicion of wrong, or where the personal representative is not transferring in that character,[51] and an administrator has been held entitled to sell the land of which he is registered owner after a lapse of 25 years from the intestate's death.[52]

Apart from any question of representative character or transmissibility of an office, the right to be registered in place of a deceased owner is sometimes decided in favour of an equitable as against a purely legal claim. Thus an executor with merely power to sell may be registered as owner of the fee simple.[53] So the personal representatives of a deceased owner who is a trustee will not be required to apply for registration, but may consent to the land being transferred to new trustees.[54]

[47] *Maddock* v. *Registrar of Titles*, *supra*; *In re O'Connor* (1899) 24 V. L. R. 896, as explained in *In re Thomas and McKenzie's Cont.* [1912] V. L. R. 1. And see *Ex p. Manning* (1905) 5 S. R. (N. S. W.) 453.

[48] *Maddock* v. *Registrar of Titles*, *supra*; *In re Cowan*, *supra*.

[49] See *Maddock* v. *Registrar of Titles*, *supra*, at p. 689. This is expressly provided for by rule in England (*ante*, p. 377).

[50] An illustration occurs in the North-West Territories: Can. 1906, s. 123A, by which a bishop, or trustees of a church, are made bodies corporate.

[51] *In re Fitzmaurice's Estate* [1918] 1 I. R. 33. See cases in note 37, p. 162 *ante*.

[52] *Ex p. Equity Trustees Co. and O'Halloran* [1911] V. L. R. 197.

[53] *In re Gow* (1867) 4 W. W. & a'B. I. 197, before land was by statute vested in the executor.

[54] *In re Tararua Club* (1908) 27 N. Z. R. 928. And see *In re O'Connor* (1899) 24 V. L. R. 896; Aust. Torr. Syst. 1021.

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In general, the position of a personal representative who is registered owner is similar to that of a trustee. Although the property cannot be made liable for the debt of the registered owner himself,[55] and may be sold in order to pay the debts of the deceased owner, yet the power of sale cannot be exercised to the prejudice of any bonâ fide purchaser who has become duly registered.[56]

SECTION 2—NON-TRANSMISSIBLE INTERESTS.

There are three typical classes of non-transmissible interests: annuity charged on land for life, interest in land held by the registered owner as joint owner only, interest in land held for life. In these cases it is not the interest of the registered owner that passes to his successor in title, but there is merely a cesser of title on the death of the registered owner.[1]

The majority of the statutes make provision for the registration of the successor, or person in whose favour the cesser of title operates. No such express provision at all is made in five jurisdictions—Ontario, Federated Malay States, Leeward Islands, British Honduras, British Columbia. In Federated Malay States[2] the enactment, corresponding with those in other statutes by which an annuity on the death of the annuitant is discharged from the register, omits all express reference to death, though no doubt this is included in "events" on which the annuity "ceases to be payable." In British Columbia[3] life estates are only registrable as "charges," and no special reference is made to death in the enactments relating to cancellation of charges.

In England and Ireland[4] provision is made in the statutes and rules for the registration of the survivor as sole owner on the death of a joint owner, and for the registration of the person entitled on the death of a tenant for life under a settlement. The case of the cesser of an annuity by the death of the annuitant is not expressly

[55] *Balding* v. *Nicholas* (1893) 19 V. L. R. 110; and see *Clarke* v. *Roe* (1899) 1 W. A. R. 123 (bankruptcy).

[56] *Re Moore and Confederation Life Assoc.* (1893) 9 Man. R. 453, stated in Can. Torr. Syst. 99.

[1] Either principle of arrangement and nomenclature can, of course, be adopted. A different scheme is followed in Own. & Inc. 250, but "cesser" of a non-transmissible interest is referred to in one of the Irish rules (I. 1910 O. 4, r. 13).

[2] F. M. S. 1911, s. 55.

[3] B. C. 1911, ss. 53, 148, 153.

[4] Eng. 1897, s. 6 (4); 1903-8 Rules, rr. 187-191; Own. & Inc. 252, 339, 354. I. 1891, s. 37 (1); 1910 O. 4, rr. 12, 13, 15.

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referred to, but is covered by the provisions relating to discharge of charges generally.[5]

In New South Wales, South Australia, Tasmania, Victoria, Western Australia, and Trinidad-Tobago,[6] provision is made for cancellation of an annuity-charge on proof of the death of the annuitant, for registration of a survivor as sole owner on death of a joint owner, and for registration of the person entitled on the death of an owner registered in respect of a life estate only. The Victorian and Western Australian statutes add the case of a "joint proprietor of any mortgage owned on a joint account in equity."

Queensland, Papua, and New Zealand,[7] omit the provision relating to joint owners, but contain the provisions for death of annuitants and life tenants, though the New Zealand enactment on the latter is drafted differently. In Fiji [8] the provision for death of life tenants is omitted, life estates being registrable only as incumbrances. In Jamaica [9] no provision (apparently by an oversight) is made with respect to the death of a joint owner of land, though the case of a "joint proprietor of any mortgage owned on a joint account in equity" is provided for. Otherwise the Fiji and Jamaica statutes follow those of New South Wales, &c.

In Manitoba, Saskatchewan, Alberta, and North-West Territories,[10] only the case of the death of an annuitant is provided for.

The enactments above referred to all contemplate the case of the deceased owner having been on the register at the time of death. If, in a jurisdiction where land passes to the executor, there has been a devise for life with remainder over and the life tenant dies without any successor or personal representative of the devisor being placed on the register, it will be necessary for the devisee in remainder to obtain a transfer from a registered personal representative; for that purpose, if necessary, an administrator de bonis non of the original testator will be appointed.[11]

[5] Eng. 1875, s. 28; 1903-8 Rules, r. 166; Own. & Inc. 308, 310. I. 1891, s. 42; 1910 O. 4, r. 18; Bro. & Gl. 67. And see *ante*, p. 298.

[6] N. S. W. 1900, ss. 66, 101; S. A. 1886, ss. 145, 188; Tas. 1862, ss. 60, 88; V. 1915, ss. 164, 268; W. A. 1893, ss. 125, 227; Tr. 1902, ss. 65, 82.

[7] Q. 1861, ss. 38, 39, 63; P. 1913, ss. 55, 109; N. Z. 1915, ss. 87, 122.

[8] Fi. 1876 (1906), ss. 18, 19, 73, 90.

[9] J. 1888, ss. 97, 105.

[10] M. 1913, s. 113; Sas. 1917, s. 119; Al. 1906, s. 64; Can. 1906, s. 101.

[11] *In re Allan* [1912] V. L. R. 286.

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CHAPTER X—STATE INDEMNITY FOR LOSS.

The indemnity machinery set up by most of the statutes, for the purpose of compensating persons who suffer loss through others being registered with a warranted title, is complementary to the provisions by which the warranted title is conferred. The right to indemnity and the right to land under a warranted title are often interchangeable rights, as where a right to indemnity arises by reason of the loss of a registered interest.[1]

In three jurisdictions—Fiji, Federated Malay States, British Honduras[2]—the statutes do not provide for indemnity being paid by the State in the event of the statutory warranty of title operating to deprive the rightful owner of his property. To this extent the system of registration of title in these jurisdictions is imperfect, since the person who is barred from recovering the land and from rectification of the register has not the alternative remedy which the payment of indemnity supplies.[3] These three jurisdictions are outside the purview of the present chapter.

In every one of the remaining nineteen provision is made by the statutes for the payment of indemnity by the State in certain cases of owners being deprived of property through the statutory warranty of title operating in favour of others. In many of the statutes these enactments are grouped with enactments relating to the raising and keeping of an indemnity fund, and to the conclusiveness of the register, whilst in some cases the same enactment relates both to State indemnity and indemnity from private individuals.[4] These matters are better dealt with sepa-

[1] This is illustrated by: *Russell* v. *Registrar-General* (1906) 26 N. Z. R. 1223; *Nicholson* v. *Drew* (1912) 21 West. R. 189 (Sas.); and by the circumstances in *Registrar of Titles* v. *Esperance Land Co.* (1899) 1 W. A. R. 118. See also Eng. 1897, s. 7 (2); On. 1914, s. 124 (7).

[2] In Fiji and Federated Malay States the registry officers are not "individually liable" for bonâ fide acts or omissions; in British Honduras the registrar is liable if a caveat is "improperly removed through" his "carelessness or fraud": Fi. 1876 (1906), s. 120; F. M. S. 1911, s. 89; B. H. 1914, sch. D r. 10. In British Honduras indemnity for loss of any legal interest may be recovered from a registered owner before the register becomes conclusive: B. H. 1914, ss. 14-16, *ante*, p. 368.

[3] This is illustrated by the cases under the Irish Incumbered Estates Acts, referred to under "Rectification" *ante*, p. 147.

[4] See Own. & Inc. 263-269; Aust. Torr. Syst. 847-866; Can. Torr. Syst 202-227. For a general account of the "Indemnity fund" from the American point of view, see Niblack's Analysis of Torr. Syst. Chap. XV., pp. 290-324. And see Hogg's Insurance Law in Australasia, 186.

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rately. The subjects of the conclusiveness of the register and the limits to this conclusiveness are dealt with in Chap. IV *ante*, p. 94, including the question of obtaining indemnity from the owner who has the warranted title, or has been responsible for the wrongful registration (*ante*, p. 147). The enactments relating to the mere raising and safe-keeping of the indemnity funds have no necessary connexion with the working of the provisions for payment of indemnity, and may be shortly dealt with first of all.

In England, Ireland, and British Columbia,[5] the indemnity fund (called "insurance" or "assurance" funds) is created out of fees paid on registration transactions, but no separate fee is payable for this purpose on any individual transaction. In other jurisdictions an "assurance fund" is raised by means of separate fees charged for that purpose on certain individual transactions, as initial applications and in some cases "transmission" applications on the death of the registered owner of freehold land. In Tasmania, Victoria, Western Australia, and Jamaica[6] special contributions to the assurance fund are sometimes required and may be made as a condition of registering a defective title. The Ontario[7] statute differs from others in expressly enacting that payments of indemnity are not to exceed the amount of the assurance fund. Nothing is said as to how indemnity is to be paid, should the assurance fund not be sufficient, in Tasmania, South Australia, Leeward Islands, Saskatchewan, Alberta, and North-West Territories. In England, Ireland, British Columbia, Victoria, Western Australia, and Jamaica,[8] already referred to, and in the remaining jurisdictions—New South Wales, Queensland, Papua, New Zealand, Trinidad-Tobago, Manitoba[9]—any deficiency in the insurance or assurance funds is to be made good out of ordinary public revenue; the creation of any special fund is thus only a matter of book-keeping.

Though called "insurance" or "assurance" funds, these funds are established for the purpose of providing indemnity against loss through the operation of the statutory warranted title, and are

[5] Eng. 1897, s. 21. I. 1891, s. 92; 1910 O. 4, rr. 2, 4. B. C. 1911, s. 136.

[6] Tas. 1862, ss. 28, 29, and 1886, s. 20; V. 1915, ss. 39, 40, 44, 98, 119, 239; W. A. 1893, ss. 40, 41, 45, 194, 197, 224; J. 1888, ss. 37, 38, 133, 134.

[7] On. 1914, ss. 123, 124 (3), 128.

[8] Eng. 1897, s. 21 (3); I. 1891, s. 92 (3); B. C. 1911, s. 127; V. 1915, s. 255; W. A. 1893, s. 210; J. 1888, s. 140.

[9] N. S. W. 1900, ss. 119, 120, 129; Q. 1861, ss. 41, 42; P. 1913, ss. 140-142; N. Z. 1915, ss. 185, 194; Tr. 1902, ss. 31, 32, 148; M. 1913, ss. 156, 162, 163.

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better referred to as "indemnity funds." The State is however in the position, for many purposes of an insurer, in warranting that the registered title of an owner shall not be impeached—and that an owner, with a title (registered or unregistered) that would otherwise be good, shall be indemnified against loss through the operation of the warranty of title.[10] An apt illustration of the working of this part of registration of title is seen in the case of a bonâ fide transferee who is secure and keeps his registered ownership, while a predecessor in title who has wrongfully been deprived of his registered ownership receives monetary compensation.[11]

The right to indemnity in general.

Notwithstanding differences in the form of the enactments as to the kind of loss for which indemnity is payable, these enactments agree for the most part in substance and meaning. The scheme of all is, with the exception of Leeward Islands, that the loss of any interest of appreciable value in land upon the register should be made good to the person damnified, where the loss is caused by the operation of the statutory conclusiveness of the register. In Leeward Islands [12] indemnity is expressly made payable to "any person aggrieved by the issue of a certificate of title," which seems to cover merely the case of an owner losing land by some wrongful registration, and not the case of a mortgagee losing his security through mistake or misfeasance on the part of the registry office.

In the eighteen remaining jurisdictions the loss of any actual interest in the land may entitle the loser to indemnity, either by force of the substantive enactments themselves—which usually refer to land or any "interest" therein—or by the aid of interpretation clauses defining "land" as including any interest in land. Accordingly, the loss of a mortgage, or loss by having land made subject to a mortgagee, will entitle the owner of the mortgage or the land to payment of indemnity.[13] So the loss of a leasehold interest will entitle the lessee to payment of indemnity.[14] But the statutes are not uniform with regard to "loss" incurred through acts or omissions of the registry, where these are not entries in or omissions from the register.

[10] See *Queensland Trustees* v. *Registrar of Titles* (1893) 5 Q. L. J. 46, 51; *Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75, 94.

[11] As in *Nicholson* v. *Drew* (1912) 21 West. R. 189 (Sas.).

[12] L. Is. 1886 (1914), s. 19. There is no indemnity for loss by registration under the Hurricane Loan Act 1900: see s. 5.

[13] Cases cited in Aust. Torr. Syst. 853, and *post*, particularly in note 42, p. 390. [14] *Russell* v. *Registrar-General* (1906) 26 N. Z. R. 1223.

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In England, where an error or omission is made in the register, or an entry is made by fraud or mistake, the person suffering loss is to be indemnified.[15] In Ireland the insurance fund is to be applied in indemnifying owners of land or incumbrances for loss through mistakes on initial registration, and for loss on subsequent registrations obtained by forgery or fraud, or error on the part of the registry office.[16] In Ontario a person deprived of an interest in land, by its being placed on the register, or by another person being registered as owner through fraud, or by reason of error in the registry, is entitled to indemnity.[17] In these three jurisdictions it seems clear that, whatever the remedy of a person injured through some misfeasance of the registry office,[18] there would be no right to indemnity under the registration statutes, unless the misfeasance involved some entry in or omission from the register by which some interest already vested in the person injured were lost. Thus, there would seem to be no right to indemnity by reason of loss arising from an incorrect certificate of official search.[19]

In seven jurisdictions—New South Wales, Queensland, Victoria, Western Australia, Papua, Trinidad-Tobago, Jamaica[20]—there are enactments which, as judicially interpreted in a Victorian case,[21] also permit of no indemnity being paid for a mere money loss caused by the misfeasance of the registry office, where the misfeasance did not consist in making or omitting an entry in the register, and the person injured had not acquired any interest in the land. But this interpretation would perhaps not be adopted in other jurisdictions than Victoria, and the dissenting judgment in the case has been held to be more satisfactory.[22]

In the remaining eight jurisdictions—South Australia, Tasmania, New Zealand, British Columbia, Manitoba, Saskatchewan,

[15] Eng. 1897, s. 7.

[16] I. 1891, s. 93.

[17] On. 1914, s. 124.

[18] As to this, see Aust. Torr. Syst. 850, 855; *Ontario Industrial Co.* v. *Lindsay* (1884) 3 O. R. 66; *Green* v. *Ponton* (1885) 8 O. R. 475.

[19] See Own. & Inc. 263. Contrast the enactments in other jurisdictions and cases on them in notes *post*, as to indemnity for loss by misfeasance of registry.

[20] N. S. W. 1900, s. 127; Q. 1861, s. 128; V. 1915, s. 250; W. A. 1893, s. 205; P. 1913, s. 149; Tr. 1902, s. 137; J. 1888, s. 138.

[21] *Oakden* v. *Gibbs* (1882), 8 V. L. R. L. 380. See Aust. Torr. Syst. 853. The repealed enactment principally relied on (s. 146 of V. 1866) is identical with V. 1915, s. 250.

[22] *Morris* v. *Bentley* (1895) 2 Terr. R. 253. And see cases under next following group of enactments.

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Alberta, North-West Territories [23]—the relevant enactments draw a clear distinction between "loss" and "deprivation of land"—a distinction held not to exist in the Victorian statute. There seems therefore to be no room for doubt as to the meaning of these enactments, viz. that indemnity may be had for a loss not amounting to loss of an already vested interest in land, if caused by any "omission, mistake, or misfeasance" on the part of the registry office, even though not involving an entry in or omission from the register. Thus, indemnity may be had for loss caused by an imperfect or incorrect "abstract" or official record of the state of the register.[24] And the loss may be a mere money loss and not an interest in the land at all, as for instance in the case of a surety for a mortgagor.[25]

Though the two groups—New South Wales, &c., and South Australia, &c—differ slightly inter se as above stated, they agree—differing in this respect from England, Ireland, and Ontario—in providing separately for "deprivation" of land and "loss" or damage. In New Zealand and Manitoba [26] the two kinds of injury are dealt with in a single section; in other jurisdictions each is the subject of a distinct section. In all, the "loss" referred to is that caused by "omission, mistake, or misfeasance" of the registry office; the "deprivation" is referred to as caused by fraud, wrongful registration of another person, error or omission in the register, though there are minute differences in the phraseology. There are also a few other differences in the enactments, to be now pointed out.

In Queensland and Papua [27] a right of action for loss through the registry's misfeasance is assumed, and not expressly given. In these two, and also in New South Wales, Victoria, Western Australia, Trinidad-Tobago, and Jamaica,[28] the expression "deprivation" of land is used in one section only, and not in that relating to loss through the registry's misfeasance, thus giving rise to a difficulty of construction (*ante*, p. 387). In Victoria and Western Australia the two principal sections are supplemented (and in effect

[23] S. A. 1886, s. 208; Tas. 1862, s. 128; N. Z. 1915, s. 186; B. C. 1911, s. 126; M. 1913, s. 154; Sas. 1917, s. 160; Al. 1906, s. 108; Can. 1906, s. 146. See Can. Torr. Syst. 221.

[24] *Hall* v. *Yorkton Registrar* (1911) 16 West. R. 568 (Sas.); *Canada Life Ass. Co.* v. *Assiniboia Registrar* (1912) 21 West. R. 469 (Sas.).

[25] *Wells and Johns* v. *Registrar-General* (1909) 29 N. Z. R. 101.

[26] N. Z. 1915, s. 186; M. 1913, s. 154. One cause of "loss or damage" in New Zealand is "wrongful inclusion of land in any certificate"; this occurs in no other jurisdiction.

[27] Q. 1861, ss. 126, 128; P. 1913, s. 147, 149. *Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75, 84.

[28] N. S. W. 1900, ss. 126, 127; V. 1915, ss. 120, 246, 250-252; W. A. 1893, ss. 201, 205-207; Tr. 1902, ss. 132, 134, 137; J. 1888, ss. 136, 138.

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replaced to some extent) by others giving a simpler and more direct right of indemnity for loss through exercise of the registry's powers, and also giving a special right of indemnity for mistakes in Crown surveys and (in Victoria) with respect to land no longer used for roads. In Trinidad-Tobago the drafting of the section relating to "deprivation" of land is by reference to another section and difficult to construe, though the meaning appears to be the same as that of the other corresponding enactments.

In South Australia, Tasmania, British Columbia, Saskatchewan, Alberta, and North-West Territories,[29] "loss" through the registry's misfeasance is more clearly distinguished from "deprivation" of land by the latter expression being used both in its own proper section and in that relating to "loss." In British Columbia one cause of "damage" expressly referred to is the misfeasance of the registry in granting "a certificate of charges or incumbrance." In British Columbia, and also in Saskatchewan, Alberta, and North-West Territories, the "bringing land under" the registration system—one of the causes of loss or deprivation in other jurisdictions—is omitted; but any such cause of loss seems to be covered by the registration of another person in place of the rightful owner.[30]

The "loss" or "deprivation" may be either of a registered or an unregistered interest. There can be no right of indemnity in respect of loss of a registered interest as such unless the title to the interest lost is warranted. It may happen that the title (though entered on the register) is not fully warranted (as in England and Ontario, with respect to "possessory" title), or that the indemnity provisions do not apply to it at all.[31] So where a particular transaction carries with it no warranty of title in the registered owner, as in the case of a forged instrument being registered.[32] But the right to indemnity will arise, both in the case of an interest removed from the register and an interest which has never been on the register, if the owner's title is shewn to have been good, and to have been taken from him solely by the operation of the statutory conclusiveness of the register in favour of another person.[33]

[29] S. A. 1886, ss. 203, 208; Tas. 1862, ss. 125, 128; B. C. 1911, ss. 123, 126; Sas. 1917, s. 160; Al. 1906, ss. 105, 108; Can. 1906, ss. 143, 146.

[30] See for instance: *Anderson* v. *Davy* (1882) 1 N. Z. S. C. 302; *Public Trustee* v. *Registrar-General* (1899) 17 N. Z. R. 577; *Hayes* v. *Bourne* (1867) 7 Q. L. J. 146.

[31] For instance, in British Columbia the indemnity provisions apply only to titles "in the register of indefeasible fees": B. C. 1911, s. 135.

[32] *Att.-Gen.* v. *Odell* [1906] 2 Ch. 75.

[33] Illustrated by: *Russell* v. *Registrar-General* (1906) 26 N. Z. R. 1223; *Spencer* v. *Registrar of Titles* [1906] A. C. 503. And see cases on double registration under "Mistake" *ante*, p. 132.

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With respect to what constitutes an interest in land, the loss or "deprivation" of which confers a right to indemnity, the cases of a mortgage and of land burdened by a mortgage have already been noticed (*ante*, p. 386). The omission of the registry office to register a mortgage in such a way that it can be found on search, or to place a caveat on the register by means of which an unregistered mortgage may be protected, may give rise to a claim for indemnity.[34] A lease registered by mistake may confer a right on the lessee's transferee, when evicted, to claim indemnity.[35] So a right to dower,[36] and an estate in remainder (though only upon its falling into possession),[37] are interests for the loss of which indemnity may be had.

The interest of an equitable mortgagee by deposit of the certificate of title is sufficient to support a claim to indemnity, where this is lost by the registered owner fraudulently inducing the registry to issue a new certificate of title on the faith of a declaration that the original was destroyed.[38] And in Victoria (though not in Western Australia) the interest of such an equitable mortgagee is indemnifiable even though unprotected by caveat.[39]

When the legal ownership and right of beneficial enjoyment are in different persons, either may claim indemnity.[40] But if the equitable owner is not damnified and makes no claim, and the legal owner has no beneficial interest at all, the latter cannot claim indemnity for the loss of his bare legal ownership.[41]

What is meant by "loss" or "deprivation" of land or an interest therein is incidentally made clearer to some extent by cases on the meaning of an interest in land. Thus, a loss or deprivation may be partial only, as where the land has become burdened with a mortgage.[42] There is no "deprivation" so long as the land or interest itself can be recovered from the person in whose name it stands on the register;[43] this of course happens whenever the reg-

[34] *Morris* v. *Bentley* (1895) 2 Terr. R. 253; *Setter* v. *Registrar* (1914) 30 West. R. 256. [35] *Russell* v. *Registrar-General*, *supra*.

[36] *Moyle* v. *Gibbs* (1883) 9 V. L. R. L. 26.

[37] *Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75; *Spencer* v. *Registrar of Titles* [1906] A. C. 503.

[38] *Tolley & Co.* v. *Byrne* (1902) 28 V. L. R. 95.

[39] *Tolley & Co.* v. *Byrne*, *supra*; V. 1915, s. 252. W. A. 1893, s. 207; 1909, s. 17. These enactments are not found in other statutes.

[40] See *Public Trustee* v. *Registrar-General* (1899) 17 N. Z. R. 577; *Williams* v. *Papworth* [1900] A. C. 563.

[41] *Blackwell* v. *Davy* (1889) 8 N. Z. R. 129.

[42] *Queensland Trustees* v. *Registrar of Titles* (1893) 5 Q. L. J. 46; *Cox* v. *Bourne* (1897) 8 Q. L. J. 66; *Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75.

[43] *Cox* v. *Bourne and Finucane* v. *Registrar of Titles*, *supra*.

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ister is not conclusive as against the person rightfully entitled, or in other words whenever the register can be rectified in favour of such a person. The converse—that a case of deprivation arises whenever land ceases to be recoverable through the register becoming conclusive—is not necessarily true. It has been held for instance that a person who can no longer recover the land by setting aside a voidable transaction—the land having passed to a purchaser in whose favour the register is conclusive—has not been "deprived" so as to be entitled to indemnity.[44]

A remainderman is not "deprived" of any interest in the land until the time when, but for the register being conclusive against him, he would have been entitled to an estate in possession—that is, on the death of the tenant for life.[45]

The loss or deprivation must have been, in order to be indemnifiable, proximately caused by the mistake or wrongful registration, and nice questions may easily arise as to the proper application of this principle. Thus, it has been held that where a fraud was committed which was only made possible by misfeasance of the registry, the fraud and not the registry's misfeasance was the proximate cause of loss.[46] A comparison of the cases of the remainderman and the voidable transfer above cited[47] shews the principle on which the right to indemnity depends, where there is more than one possible cause of loss. The remainderman's loss was due to the action of the registry in placing an erroneous construction upon certain documents and registering the owner as entitled to an estate in fee instead of a life estate; the owner who lost his land through the voidable transfer sustained this loss by reason of a bonâ fide purchaser eventually becoming registered, and such a loss might have happened apart from any question of registration.

Connected with the question of proximate cause of loss is that of contributory negligence, which however is the subject of statutory enactment in one form or another in most of the nineteen jurisdictions. In Papua and Leeward Islands the statutes are silent on this point.[48] In other jurisdictions certain cases only of con-

[44] *Fawkes* v. *Att.-Gen.* (1903) 6 O. L. R. 490. This decision is criticised in Can. Torr. Syst. 209.

[45] *Spencer* v. *Registrar of Titles* [1906] A. C. 503, 510; *Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75, 96.

[46] *Oakden* v. *Gibbs* (1882) 8 V. L. R. L. 380, and see Own. & Inc. 267.

[47] *Spencer* v. *Registrar of Titles* and *Fawkes* v. *Att.-Gen.*, *supra*. In the latter case some intermediate transfers were in fact forged, but this was held under the circumstances not to affect the principle on which the case was decided.

[48] But even in Papua (as in most other jurisdictions) no indemnity is payable for loss through breach of trust; this has some connexion with the subject of contributory negligence, and is dealt with further on.

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tributory negligence are referred to by the statutes. Only in England, Ireland, and Ontario [49] is it expressly enacted that indemnity is not payable to any person who has "caused or substantially contributed to the loss by" his own "act, neglect, or default." In England and Ontario "omission to register a sufficient caution," &c. for the protection of unregistered interests, is to "be deemed neglect." In Ontario the failure to protect equitable interests by caution upon initial registration, and the failure to appear upon receiving notice of any proceedings at the registry, will also bar any right to indemnity.

In the remaining fourteen jurisdictions there are enactments rather resembling the last mentioned provisions of the Ontario statute. In New South Wales, Tasmania, Victoria, Western Australia, New Zealand, Trinidad-Tobago, and Jamaica,[50] omission to enter a caveat and keep it in force, after knowledge of proceedings for initial registration, disentitles a claimant for indemnity; in New Zealand failure to register at a deeds registry a document that could have been registered there may also be a bar to indemnity. In Queensland [51] there is no express penalty attached to allowing a caveat to lapse, as there is in other jurisdictions just referred to. In South Australia, British Columbia, Manitoba, and Saskatchewan,[52] knowledge of any proceedings causing loss to the claimant, and failure to take proper steps accordingly, will be a bar to a claim for indemnity; defects in foreclosure proceedings are specially mentioned in the case of British Columbia. In Alberta and North-West Territories [53] knowledge of "delay," and omission to enter and keep in force a caveat, is made a bar.

There is also an enactment relevant to this subject in these jurisdictions, which is not found in the statutes of England, Ireland, or Ontario. This enactment provides (except in North-West Territories) that indemnity cannot be had for loss through breach of trust on the part of a registered owner. In Queensland, Papua, and New Zealand,[54] the word used is "trust" simply, and the enactment here applies only to express trusts, so that it is possible to

[49] Eng. 1897, s. 7 (3); I. 1891, s. 93 (2); On. 1914, s. 127. Own. & Inc. 264.

[50] N. S. W. 1900, s. 130 (3); Tas. 1862, s. 130; V. 1915, s. 256; W. A. 1893, s. 211; N. Z. 1915, ss. 56, 196; Tr. 1902, s. 139; J. 1888, s. 141. See Aust. Torr. Syst. 750.

[51] Q. 1861, s. 21.

[52] S. A. 1886, s. 216; B. C. 1911, ss. 14 A (5), 134; M. 1913, s. 161; Sas. 1917, s. 169.

[53] Al. 1906, s. 110; Can. 1906, s. 149. These enactments are not intelligible as they stand; apparently some mistake in drafting has been made.

[54] Q. 1861, s. 42; P. 1913, s. 141 (3); N. Z. 1915, s. 193.

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recover indemnity for loss caused by a mere constructive trustee.[55] In other jurisdictions the expression used is "trust, whether express, implied, or constructive," thus excluding the application of the Queensland case cited. Thus in New South Wales, South Australia, Tasmania, Victoria, Western Australia, Trinidad-Tobago, Jamaica, British Columbia, Manitoba, Saskatchewan, and Alberta,[56] indemnity cannot be had for loss through any breach of trust, whether the trust be express or not. In North-West Territories [57] however, indemnity may be had on failure to recover from the person primarily liable.

There are some other enactments which appear to be relevant to the question of contributory negligence. In South Australia, Western Australia, and New Zealand,[58] indemnity cannot be had for loss through improper exercise of a power of sale, or (in New Zealand) power of re-entry, nor can indemnity be had in Western Australia for loss through issue of a special certificate of title when an unregistered interest is not protected by caveat.[59] In New Zealand and Saskatchewan [60] no indemnity can be had for loss through improper use of the seal of a corporation, or though the registration of an instrument executed by a person under legal disability—unless disclosed on the instrument.

The principle common to all these enactments directly or indirectly referring to contributory negligence is that there are certain matters relating to the title of a registered owner which the person dealing with him must investigate for himself, and no indemnity can be had if loss ensues through a failure to discover a defect in the owner's title with regard to them. These matters vary slightly in different jurisdictions, but they are such as are considered to be easily investigated by prudent persons. Apart from actual enactment, a person suffering loss to which he has himself contributed by omitting to take reasonable precautions—as by searching the register, and giving the correct names of persons against whom search is to be made—will not be entitled to indem-

[55] *Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75, 92.

[56] N. S. W. 1900, s. 133; S. A. 1886, s. 211; Tas. 1862, s. 133; V. 1915, s. 241; W. A. 1893, s. 196, and 1909, s. 17; Tr. 1902, s. 141; J. 1888, s. 143; B. C. 1911, s. 132; M. 1913, s. 159; Sas. 1917, s. 170; Al. 1906, s. 121. See *Ex p. Saunders* (1900) 21 N. S. W. 291; Aust. Torr. Syst. 849.

[57] Can. 1906, s. 161.

[58] S. A. 1886, s. 216; W. A. 1909, s. 17; N. Z. 1915, s. 193.

[59] This in effect abrogates the decision in *Tolley & Co.* v. *Byrne* (1902) 28 V. L. R. 95, so far as Western Australia is concerned; *ante*, p. 390.

[60] N. Z. 1915, s. 193; Sas. 1917, s. 170. See Aust. Torr. Syst. 851; Can. Torr. Syst. 217.

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nity.[61] The doctrine of contributory negligence is specially applicable in England, Ireland, and Ontario, by reason of the provisions in the statutes making the claimant's "act, neglect, or default" a bar to indemnity (*ante*, p. 392). In these three jurisdictions even the "act" of presenting a forged instrument for registration will preclude the person presenting it (usually a transferee or mortgagee) from any right to indemnity when his registration is subsequently vacated.[62] In other jurisdictions—where the statutes do not contain the enactment on "act, neglect, or default" above referred to—the rule would appear, on general principles, to be the same,[63] and the doctrine of contributory negligence would seem to apply as in England, Ireland, and Ontario.

Apart from cases of contributory negligence, &c., indemnity cannot always be recovered for loss. Sometimes the area of the land is not considered to be warranted, and indemnity cannot then be had if the actual area is less than that appearing on the register.[64] In British Columbia [65] it is enacted that indemnity cannot be recovered for "any error or shortage in area" of land according to a plan filed in the registry.

The subject of overlapping grants from the Crown is specially dealt with in some jurisdictions. In eight this is not referred to at all by the statutes, viz. England, Ireland, Ontario, Manitoba, Queensland, Papua, Jamaica, and Leeward Islands. In Trinidad-Tobago [66] it is expressly enacted that "the Crown or the assurance fund shall not under any circumstances be liable for compensation for any loss . . in any case in which the same land may have been included in two or more grants from the Crown." In New Zealand, British Columbia, and Saskatchewan,[67] there are similar enactments, but referring only to "the assurance fund" and not mentioning the Crown; on the construction of these enactments no indemnity from State funds would seem to be recoverable in any way for loss through inclusion of land in more than one grant from the Crown. There are also similar enactments in Victoria and Western Australia [68] relieving "the assurance fund," but a special right to indemnity is given for loss occasioned by "inaccuracy" in

[61] *Miller* v. *Davy* (1889) 7 N. Z. R. 515; *Sievell* v. *Haultain* (1911) 18 West. R. 388 (Sas.). See Aust. Torr. Syst. 849.

[62] *Att.-Gen.* v. *Odell* [1906] 2 Ch. 75.

[63] See *Sheffield Corp.* v. *Barclay* [1905] A. C. 392, upon which the decision in *Att.-Gen.* v. *Odell* was based.

[64] *Burden* v. *North Alberta Registrar* (1913) 25 West. R. 460 (Al.).

[65] B. C. 1911, s. 132.

[66] Tr. 1902, s. 141.

[67] N. Z. 1915, s. 193; B. C. 1911, s. 132; Sas. 1917, s. 170.

[68] V. 1915, ss. 241, 251; W. A. 1893, ss. 196, 206.

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a description of land upon a sale by the Crown. In North-West Territories [69] indemnity for inclusion of land in more than one grant from the Crown is expressly allowed, and no distinction is made between this and other kinds of loss. In the four remaining jurisdictions—New South Wales, South Australia, Tasmania, Alberta [70]—"the assurance fund" is relieved of liability, but indemnity may be had by means of an action against a nominal defendant on behalf of the Crown.

In most jurisdictions it is necessary for a formal action in the courts to be instituted. But in eight—England, South Australia, Tasmania, Victoria, Western Australia, New Zealand, British Columbia, Manitoba [71]—compensation may be paid by the registry without any formal litigation.

The Measure of Damages.

The measure of damages for which indemnity may be had is of course the value of the interest lost. In the case of land this will ordinarily be the value of the land, but not more than the actual loss suffered.[72] The loss may be the amount of an incumbrance on the land, or the sum required in order to recover possession of the land.[73] If the interest lost is a mortgage or charge on the land, the amount recoverable will be the amount of the charge, or (if the charge be an annual one) its capitalized value.[74]

The value of the land is to be taken as at the time of the loss, which means the time of the right of action accruing.[75] This, in the case of a remainderman claiming indemnity, is not necessarily the time of the land being first placed on the register, but the time of the loss is the moment when the remainder would, but for the registration, have fallen into possession.[76]

[69] Can. 1906, ss. 143, 161.

[70] N. S. W. 1900, ss. 126, 133; S. A. 1886, s. 214; Tas. 1862, ss. 125, 133; Al. 1906, ss. 105, 121.

[71] Eng. 1897, s. 7 (5); S. A. 1886, s. 210; Tas. 1893, s. 7; V. 1915, s. 253; W. A. 1893, s. 208; N. Z. 1915, s. 188; B. C. 1911, s. 133; M. 1913, s. 160.

[72] *Hayes* v. *Bourne* (1895) 7 Q. L. J. 146; *Russell* v. *Registrar-General* (1906) 26 N. Z. R. 1223; *Registrar of Titles* v. *Spencer* (1909) 9 C. L. R. 641, 645.

[73] *Cox* v. *Bourne* (1897) 8 Q. L. J. 66; *Finucane* v. *Registrar of Titles* [1902] S. R. Q. 75, 94.

[74] *Cox* v. *Bourne, supra; Williams* v. *Papworth* [1900] A. C. 563; *Daly* v. *Papworth* (1906) 6 S. R. (N. W. S.) 572.

[75] *Spencer* v. *Registrar of Titles* [1908] A. C. 235. The history of this litigation is given in *Spencer* v. *Registrar of Titles* (1911) 103 L. T. 647 (P. C.); there were three appeals to the Privy Council, and one to the High Court of Australia.

[76] *Spencer* v. *Registrar of Titles* [1906] A. C. 503.

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Where the property lost consists of the land itself, the question of the value at which it is to be assessed for the purpose of compensation may depend on whether any buildings or other improvements have been placed on the land, and when this was done. The general rule is that the loss is to be measured by the value of the land with the buildings then upon it, at the time of the loss and consequent right of action accruing.[77] Subsequent removal of buildings, or erection of new buildings, will thus not affect the basis of assessment. The New Zealand statute [78] speaks of buildings, &c. erected "prior to the time of" loss, but this would seem to mean immediately prior, and not at any indefinite period prior to loss. The general rule as to excluding from the assessment of compensation the value of buildings erected subsequently to the loss is expressly laid down by the statutes only in South Australia, Victoria, Western Australia, and Jamaica,[79] but would seem to hold good in other jurisdictions. In South Australia, though the statute excludes the value of buildings erected subsequently to loss—as in Victoria, &c.—there follow the words "and with notice thereof," viz. of the loss through wrongful registration; this of course could only apply in the case of the registered owner in possession erecting buildings and having the register rectified against himself, and could not apply to a person seeking indemnity in lieu of rectification.

A person entitled to indemnity, on the footing of receiving the value of buildings on the land, is not necessarily entitled to the value of the fixtures. Thus, a remainderman who is entitled to indemnity for loss of the land is not entitled to the value of the fixtures, if these would have passed to the executor of the tenant for life.[80]

A right to indemnity for loss of land will not entitle the person injured to compensation for loss of profits, or for loss through an action of trespass being brought against him.[81] A sum of money as representing mesne profits, or interest as the equivalent, may sometimes be recovered, and the New Zealand statute [82] makes special provision for recovery of interest from time of loss until judgment in the action; but mesne profits and interest are not

[77] *Spencer* v. *Registrar of Titles* [1908] A. C. 235, 240; *Registrar of Titles* v. *Spencer* (1909) 9 C. L. R. 641, 645.

[78] N. Z. 1915, s. 194.

[79] S. A. 1886, s. 209; V. 1915, ss. 246, 250; W. A. 1893, ss. 201, 205; J. 1888, ss. 136, 138.

[80] *Registrar of Titles* v. *Spencer* (1909) 9 C. L. R. 641.

[81] *Russell* v. *Registrar-General* (1906) 26 N. Z. R. 1223.

[82] N. Z. 1915, s. 194.

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always recoverable as a matter of right, if the compensation received is otherwise ample.[83]

The amount recovered as compensation or indemnity is to be regarded as damages strictly, and not money devolving as the land would have devolved; consequently, joint tenants who recover a single sum representing their aggregate loss will be entitled to share this sum as tenants in common.[84]

The time limit for indemnity, and notice of action.

Something has been said already as to the date of deprivation or loss, and the accrual of the consequent right of action (*ante*, p. 391). This date is chiefly important by reason of the time limit within which the claim for indemnity must be made. In all nineteen jurisdictions, except Leeward Islands, the statutes themselves state the time limit. In the Leeward Islands [85] only is reference made to general legislation on the subject of actions against the Crown. In South Australia the time limit is twenty years from the date of the right of action accruing, with no saving of disabilities; in Manitoba the limit is ten years, and a further period in case of disability.[86] In other jurisdictions the period of limitation is six years and (in most) a further period for cases of disability. No such further period is allowed in England or Queensland.[87]

In jurisdictions where a further period for disabilities is allowed, infant beneficiaries may be able to recover compensation notwithstanding that their trustees are barred.[88]

Only in England [89] is the time limit governed by the claimant's knowledge of the existence of the claim, and the cause of action arises only "when the claimant knows, or but for his own default might know, of the existence of his claim." Elsewhere the right of action accrues, and consequently time runs, independently of the claimant's knowledge.[90]

In England, Ireland, Ontario, Queensland, New Zealand, Sas-

[83] *Speneer* v. *Registrar of Titles* (1911) 103 L. T. 647 (P. C.).

[84] *Daly* v. *Papworth* (1906) 6 S. R. (N. W. S.) 572.

[85] L. Is. 1886 (1914), s. 19; the Crown Suits Act 1907 (No. 10) is there referred to. Presumably the general limitation statutes would apply, as in an ordinary action for damages.

[86] S. A. 1886, s. 215; M. 1913, s. 158.

[87] Eng. 1897, s. 7 (7); Q. 1861, s. 127.

[88] *Williams* v. *Papworth* [1900] A. C. 563, 568; *Papworth* v. *Williams* (1899) 20 N. S. W. 280.

[89] Eng. 1897, s. 7 (7).

[90] Illustrated by: *Bonnin* v. *Andrews* (1872) 12 S. A. R. 153; *Hamilton* v. *Iredale* (1903) 3 S. R. (N. S. W.) 535; *Williams* v. *Papworth*, *supra*.

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katchewan, Alberta, and North-West Territories,[91] the statutory time limit applies only in terms to actions for indemnity out of State funds, nothing being said in the statutes as to any time limit in respect of actions for compensation against private individuals. In other jurisdictions the time limit applies to all actions—whether against private individuals or persons representing State funds. Where the registration statutes are silent on this point, the time limit would presumably be that applicable to ordinary actions for damages, under the general limitation statutes.

Enactments relating to time limits and not specially cited above are those of: New South Wales, Tasmania, Victoria, Western Australia, Papua, Trinidad-Tobago, Jamaica, and British Columbia.[92]

Notice must usually be given of the intention to bring an action before commencing it. In New Zealand[93] notice to the registrar of a claim under an unregistered deed may be necessary.

Recovery by the Crown of amount paid as indemnity.

In all nineteen jurisdictions the statutes contain provisions for enabling the amount of the indemnity paid out of State funds to be recovered under some circumstances by the State or Crown. In England, Ireland, and New Zealand,[94] this is the only provision for recovering the value of land from a person who has been wrongfully registered; in other jurisdictions the value can be recovered by private individuals, as pointed out *ante* p. 147. In England and Ireland the amount of indemnity paid may be recovered from anyone who has caused the loss; in New Zealand, only when the indemnity has been paid by reason of some fraudulent conduct, and from the person who was responsible for the fraud. In Ontario[95] also, the person on whose application the wrongful registration was made, or who acquired title by fraud or error, is liable for the amount of indemnity paid; in Leeward Islands[96] the statute is to the same effect, though differently worded.

In Manitoba and Saskatchewan[97] the amount of indemnity paid may be recovered from the person whose "fraud or wrongful

[91] Eng. 1897, s. 7 (7); I. 1891. s. 93 (6); On. 1914, s. 124 (3); Q. 1861, s. 127; N. Z. 1915, s. 195; Sas. 1917, s. 167; Al. 1906, s. 110; Can. 1906, s. 148.

[92] N. S. W. 1900, s. 130; Tas. 1862, s. 130; V. 1915, s. 256; W. A. 1893, s. 211; P. 1913, s. 151; Tr. 1902, s. 139; J. 1888, s. 141; B. C. 1911, s. 130.

[93] N. Z. 1915, s. 56.

[94] Eng. 1897, s. 7 (6); I. 1891, s. 93 (5); N. Z. 1915, s. 190.

[95] On. 1914, s. 124 (6).

[96] L. Is. 1886 (1914), s. 19 (2).

[97] M. 1913, s. 154; Sas. 1917, s. 163.

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act" has caused the loss, and the procedure is peculiar to these two provinces. In Alberta and North-West Territories,[98] when indemnity has been paid "on account of any person" the amount may be recovered from him or his representatives.

In most of the remaining jurisdictions there is no provision for the indemnity paid being recovered directly from a person who has caused the loss, but only from his estate or assets under certain circumstances. In Queensland [99] a person absconding and subsequently found within the jurisdiction is liable. In British Columbia [1] the remedy is against the assets of a person who is dead or out of the jurisdiction, and in New South Wales, South Australia, Tasmania, Victoria, Western Australia, Papua, Trinidad-Tobago, and Jamaica,[2] against the assets of one who is dead, bankrupt (or insolvent), or out of the jurisdiction.

There appears to be no reported case in which an action for recovery of indemnity paid by the State has been brought under any of these enactments.

[98] Al. 1906, s. 111; Can. 1906, ss. 150, 151.

[99] Q. 1861, s. 127.

[1] B. C. 1911, s. 131.

[2] N. S. W. 1900, ss. 131, 132; S. A. 1886, ss. 218, 219; Tas. 1862, s. 132; V. 1915, s. 240; W. A. 1893, s. 195; P. 1913, s. 152; Tr. 1902, s. 140; J. 1888, s. 142.

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Appendix of Statutes

Lists of statutes in each jurisdiction are given *ante*, p. 7 *et seq.* The portions of statutes here set out are printed with any amending and supplemental enactments introduced into or set out immediately after the relevant sections. Only such statutes are printed as are not readily accessible. Thus, it has not been thought necessary to include the English or Irish statutes, or all the Australian statutes. The jurisdictions whose statutes are in part here set out, or are referred to, are the following: New South Wales, Victoria, Western Australia, Papua, New Zealand, Fiji, Federated Malay States, Ontario, British Columbia, Manitoba, Saskatchewan, Alberta, North-West Territories, Trinidad-Tobago, Jamaica, Leeward Islands, British Honduras. References in thick brackets to sections elsewhere printed do not imply verbal identity, but merely substantial similarity; in matters of procedure particularly, there are necessarily differences corresponding with differences in local conditions.

The Australasian statutes not here printed may be found in Hogg's Australian Torrens System, viz., those of New South Wales, Queensland, South Australia, Tasmania, Western Australia, Fiji. The English statutes may be found in Hogg's Ownership and Incumbrance of Registered Land, Brickdale and Sheldon's Land Transfer Acts, and other text-books, the Irish statute in Browning and Glover's Registration of Title in Ireland. Both English and Irish statutes are also accessible in ordinary editions of statutes of the United Kingdom, and (with the rules) are purchasable at a nominal cost.

NEW SOUTH WALES.

The New South Wales statutes up to the year 1905 are printed in Aust. Torr. Syst. 87 *et seq.*, and the only subsequent statutes that require mention are those of 1905, 1907, and 1909 (*ante*, p. 8). These three statutes are of local and limited scope, and merely provide for modifications of the ordinary procedure in placing land in certain districts (indicated by the titles of the statutes) upon the register.

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VICTORIA.

TRANSFER OF LAND ACT 1915

(6 Geo. 5, No. 2740).

6 Sept. 1915.

NOTE.—This is a consolidating statute, amended in 1916. Some portions of it that are here printed differ from the Act of 1890; others are frequently referred to in the text *ante*, or are otherwise sufficiently important to be set out. Many sections dealing with mere procedure and administration, or otherwise of less importance, and most of the schedules, are not printed here; the omitted portions do not usually differ in any material respect from the Act of 1890 as printed in Aust. Torr. Syst. 497 *et seq.*, and (when necessary) references to repealed Acts are inserted.

[Title, preamble, &c.: V. 1890, title, &c., Aust. Torr. Syst. 497.]

1. This Act may be cited as the Transfer of Land Act 1915, and shall come into operation on the first day of October, 1915, and is divided into parts and divisions as follows:—

PART I.—Officers, s.. 5-15.
PART II.—Bringing land under the Act, ss. 16-46.
PART III.—Certificates of title and registration, ss. 47-86.
PART IV.—Title by possession to land under the Act. Removal of abandoned easements, ss. 87-104.
PART V.—Roads, passages, &c., ss. 105-120.
PART VI.—Dealings with land.
- Division 1.—Transfers, ss. 121-130.
- Division 2.—Leases and sub-leases, ss. 131-134.
- Division 3.—Mortgages and annuities, ss. 145-174.
- Division 4.—Miscellaneous, ss. 175-182.

PART VII.—Caveats, ss. 183-188.
PART VIII.—Powers of attorney and attestation of instruments, ss. 189-191.
PART IX.—Registration abstracts, search certificates, and stay orders, ss. 192-200.
PART X.—Surveys, plans, parcels, and boundaries, ss. 201-214.
PART XI.—Rectification of certificates, ss. 215-224.
PART XII.—Special powers and duties of the commissioner and registrar, ss. 225-238.
PART XIII.—Assurance fund, ss. 239-242.
PART XIV.—Actions and other remedies, ss. 243-258.
PART XV.—Offences, ss. 259-263.
PART XVI.—Miscellaneous, ss. 264-281.

2. The Acts mentioned in the first schedule to this Act, to the extent to which the same are thereby expressed to be repealed, are hereby repealed: provided that such repeal shall not affect any appointment, declaration, or any certified statement or list made, or any application pending, or any registration effected, or any notice or certificate given, or any memorial entered, or any caveat lodged, or any seal prepared, or any title, estate, interest, claim, right of dower, or other

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right or power of attorney, existing or duly acquired under the said Acts or any of them before the commencement of this Act.

3. Except so far as is expressly enacted to the contrary, no law, statute, Act or rule, so far as inconsistent with this Act, shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Act. This Act shall not be construed as limiting or abridging any provisions of the Married Women's Property Act 1915.

4. In the construction of this Act, unless inconsistent with the context or subject-matter—

"Addition" means the description as to residence, profession, trade, or occupation of any person:

"Annuitant" means the proprietor of an annuity or charge:

"Annuity" means a sum of money payable periodically and charged on land under the operation of this Act by an instrument hereunder:

"Charge" means the instrument creating and charging an annuity:

"Commissioner for taking affidavits" means a commissioner of the Supreme Court of Victoria for taking affidavits, or a commissioner for taking declarations and affidavits:

"Court" means Supreme Court:

"Incumbrances" includes all prior estates, interests, rights, claims, and demands which can or may be had, made, or set up in, to, upon, or in respect of the land:

"Endorsed" includes anything written upon, or in the margin, or at the foot of any document:

"Examiner of titles" means one of the examiners appointed under any of the Acts heretofore in force or under this Act, and any other person being a barrister and solicitor appointed as such examiner under this Act:

"Grant" means the grant by his Majesty of land whether in fee or for years, and includes a lease for years by the board of land and works granted under the authority of The Amending Land Act 1865:

"Grantor" means the proprietor of land charged with the payment of an annuity:

"Instrument" includes a transfer, lease, sub-lease, mortgage, charge, and creation of an easement:

"Judge" means a judge of the Supreme Court of Victoria:

"Land" includes messuages, tenements and hereditaments corporeal or incorporeal; and in every certificate of title, transfer, and lease issued or made under this Act, such word also includes all easements and appurtenances appertaining to the land therein described, or reputed to be part thereof or appurtenant thereto:

"Person" includes a corporation whether aggregate or sole:

"Proprietor" means the owner, whether in possession, remainder, reversion or otherwise of land, or of a lease, mortgage, or charge, whose name appears or is entered as the proprietor thereof in the register book; and such word also includes the donee of a power to appoint or dispose of the same:

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"Settlement" means any document under or by virtue of which any land is so limited as to create partial or limited estates or interests:

"Sheriff" includes the sheriff, and any deputy sheriff, or person appointed to execute any writ of fieri facias:

"Transmission" means the acquirement of the ownership of freehold land under the will, or any writing in the nature of a will, of the proprietor or under any settlement.

[5-15: V. 1890, ss. 5-15, Aust. Torr. Syst. 502; ss. 16-18 of V. 1890 are omitted from V. 1915.]

PART II. BRINGING LAND UNDER THE ACT.

16. The grants in fee or for years, or by way of perpetual lease, of all Crown lands remaining unalienated shall be in duplicate, and in addition to proper words of description shall refer to a map of the land on the scale at present used, or on such other scale as the Governor in Council from time to time directs; and after payment of the fee for the grant, and of the contribution to the assurance fund (in cases wherein such contribution is payable), shall be delivered to the registrar, who shall register the same in manner hereinafter directed. Such registration shall be deemed and taken to be an enrolment of record of the grant; and such enrolment shall relate back to the day of the date of the grant, and either part of the grant when registered under this Act shall be sufficient evidence of a duly enrolled grant of the land therein described to the person therein named on the day of the date thereof.

17. At the time of the registration of every grant in fee to two or more persons in joint tenancy for any public purpose, the registrar shall endorse thereon, and on every subsequent certificate of title, the words "no survivorship," and shall sign his name thereto.

18. Land alienated in fee by any predecessor of his Majesty before the second day of October, 1862, may be brought under the operation of this Act on an application in the form in part I. of the second schedule; which application may be made by any of the following persons (that is to say):—

(i) The person claiming to be the owner of the fee simple, either at law or in equity:

(ii) Persons who collectively claim to be the owners of the fee simple, either at law or in equity:

(iii) Persons who have the power of appointing or disposing of the fee simple:

(iv) The person claiming to be the owner of the first estate of freehold, if the owner of the first vested estate of inheritance consents to the application:

(v) Trustees for sale of the fee simple: provided that if any previous consent to their selling is requisite the application is consented to by the persons required to give such consent:

(vi) The guardian of any infant, or the committee of the estate of any lunatic or person of unsound mind unable to govern his estate, so however that the application is made on behalf of such infant, lunatic or person, and the certificate of title is directed to issue in his name:

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(vii) A tenant for life within the meaning of the Settled Estates and Settled Lands Act 1915: provided that the application contains a direction that the certificate of title be issued in the names of the trustees of the settlement within the meaning of that Act, and the trustees consent to the application.

Provided always that a mortgagor shall not be entitled to make such application unless the mortgagee consents thereto; nor a mortgagee unless in the exercise of his power of sale, and unless the certificate of title is directed to issue in the purchaser's name; nor a married woman unless her husband consents thereto, and the application is acknowledged by her in the manner hereinafter mentioned as to the acknowledgment of instruments (except she is entitled to the land for her separate use or has a power to appoint the same). Provided also that the attorney of any corporation, howsoever and wheresoever incorporated, whether already constituted or hereafter to be constituted by a power of attorney under a seal purporting to be the common seal of the corporation giving the power, may make such application for or on behalf of the corporation of which he is the attorney, and may make the requisite declaration to the best of his knowledge, information and belief, and may subscribe the application in his own name.

In applications to bring land under the Act the commissioner may accept as evidence recitals, statements, and descriptions of facts, matters and parties in deeds, instruments, Acts of Parliament, or statutory declarations not less than twenty years old, and an applicant shall not be required to negative, save as to the knowledge, information and belief of himself and his agents, the existence of any unregistered conveyances or assurances affecting any part of the land the subject of the application.

[19-22: V. 1890, ss. 22-25, Aust. Torr. Syst. 504, 505.]

23. On an application to bring land under this Act on a title claimed by possession, the applicant shall post on the land the subject of the application, or at such place as the commissioner directs, a notice in the form in part II. of the second schedule, either accurately describing or necessarily including the land claimed by possession, and shall keep the same so posted for not less than twenty-one days prior to the granting of such application; and the commissioner may refuse to issue the certificate until it has been proved to his satisfaction that the requirements of this section have been complied with.

24. If before the registration of the certificate the registrar has not received a caveat forbidding the same, he shall bring the land under this Act by registering in the name of the applicant, or in the name of such person as has been directed in that behalf, a certificate of title to the land in the form in the third schedule.

[25-28: V. 1890, ss. 28-31, Aust. Torr. Syst. 506, 507.]

29. Any person claiming any estate or interest in the land described in the advertisement may, before the registration of the certificate, lodge a caveat with the registrar in the form in the fourth schedule forbidding the bringing of such land under this Act. Every such caveat shall be signed by the caveator or by his agent, and shall particularize the estate or interest claimed; and the person lodging such caveat shall if required by the registrar support the same by a statutory declaration, stating the nature of the title under which the

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claim is made, and also deliver a perfect abstract of the title to such estate or interest. No such caveat shall be received unless some address or place within the present limits of the city of Melbourne shall be appointed therein, as the place at which notices and proceedings relating to such caveat may be served.

30. The registrar upon receipt of such caveat shall notify the same to the applicant, and shall suspend proceeding in the matter until such caveat has been withdrawn, or has lapsed as hereinafter provided, or until an order in the matter has been obtained from the full court of the Supreme Court. The applicant may if he thinks fit summon the caveator to attend before the full court to show cause why such caveat should not be removed; and such court may, upon proof that such caveator has been summoned, make such order in the premises, either ex parte or otherwise and as to costs, as to such court seems fit.

31. After the expiration of one month from the receipt thereof such caveat shall be deemed to have lapsed, unless the person by whom or on whose behalf the same was lodged within that time has taken proceedings in a court of competent jurisdiction to establish his title to the estate or interest specified in the caveat, and has given written notice thereof to the registrar, or has obtained and served on him an injunction or order of the Supreme Court or a judge restraining him from bringing the land under this Act. A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest.

32. After an application has been made to have any land brought under the operation of this Act, a judge may require all persons having in their possession or custody any deeds, instruments, or evidences of title relating to or affecting the land the subject of such application, to produce the same at the office of titles to the commissioner, and to any examiner of titles for his inspection, upon such terms and subject to such conditions and for such charge or fee as the judge making the order thinks just and fixes. All applications to be made to a judge under this section may be made by summons in chambers by the applicant owner, or by the person to whom he has directed a certificate of title to be issued.

33. An applicant may withdraw his application at any time prior to the registration of the certificate; and the registrar shall in such case return to the applicant, or to the person appearing by the application to be entitled thereto, all muniments of title lodged in support of the application; but in such case, if a caveator has been put to expense without sufficient cause by reason of such application, he shall be entitled to receive from the applicant such compensation as a judge on a summons in chambers deems just and orders.

34. Upon registering a certificate of title, the registrar shall endorse upon the last material registered document lodged in support of the application a memorandum that land included in such document has been brought under this Act, without specifying the land or referring to the certificate in which the land brought under this Act is included, and shall endorse a like memorandum on the memorial of such document in the registrar-general's office, and shall sign each such memorandum; and if the documents lodged relate to any property other than the land included in such certificate, the registrar shall

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return them to the applicant, or to the person appearing by the application to be entitled thereto, otherwise the registrar shall stamp each of them as cancelled, and after he has so stamped them shall retain the same in the office; and no person shall be entitled to an inspection of such documents, or to have any copy thereof or extract therefrom, without the written order of the applicant, or of some person claiming through or under him, or upon the order of a judge or of the commissioner. No action shall be brought upon any covenant or agreement for the production of the documents which are so retained, or upon any agreement to give or enter into a covenant for the production thereof; and if any such action is commenced, it shall be a sufficient answer thereto that such documents are retained under this Act. But every person entitled to production under any such covenant or agreement shall be entitled to obtain from the commissioner the order hereinbefore mentioned.

35. Where any subsisting lease has been lodged, the registrar shall, after he has endorsed the same as above provided in the case of the last material registered document, return such lease to the person lodging the same, upon the applicant lodging with the registrar a certified copy of such lease.

36. The registrar shall keep a book to be called the "record book," in which shall be kept a record of all deeds and documents produced and used in support of each application to bring land under this Act which hereafter is granted. Such record shall state briefly the nature and date of and parties to every such deed or document, by whom executed or signed, and whether registered under the general law or not, and if registered the date of such registration; and the record book shall be open for inspection by the public during the hours and days of business on payment of a fee for one hour's search therein of one shilling, or such other fee as may hereafter be prescribed.

37. In case the applicant, or the person in whose name the certificate of title has been directed to issue, dies between the application and the registration of the certificate, it shall be registered in the name of such applicant or of such person (as the case may be); and such land shall devolve or pass in like manner as if the certificate had been registered prior to the death of such applicant or person.

38. Land leased for a term of years of which ten years are unexpired, or leased for years determinable with a life or lives, may be brought under the operation of this Act as near as may be in a similar manner, and subject to the same or similar provisions, as are hereinbefore contained with respect to freehold land. The application may be made by persons having such estates and interests in the leasehold land as are similar or correspondent to the estates and interests of the persons entitled to apply to bring freehold land under this Act. Every certificate of title to leasehold land shall always be subject to the rights and powers of the lessor or his representative, and of any person entitled to the inheritance in the land immediately expectant on the term, as well as to the incumbrances hereinafter mentioned as not requiring special notification. The several provisions of this Act with respect to freehold land shall apply to leasehold land, with such variations only as the difference in the nature of such property requires, or as are necessary to render such provisions applicable to leaseholds for years.

[39-43: V. 1890, ss. 42-46, Aust. Torr. Syst. 510, 511.]

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44. Notwithstanding anything hereinbefore contained, the commissioner may, after the publication of such advertisements as he deems fit, direct the registrar to bring any land under the operation of this Act upon the applicant contributing to the assurance fund such an additional sum of money as the commissioner certifies under his hand to be in his judgment a sufficient indemnity, by reason of the non-production of any document affecting the title, or of the imperfect nature of the evidence of title or against any uncertain or doubtful claim or demand arising upon the title.

45. An office copy of any order heretofore made, or which hereafter is made, by the Supreme Court (whether such order hereafter is in the form of an order confirming the report of the master-in-equity or the certificate of the chief clerk, or in any other form) confirming a person as the purchaser of any land sold in fee simple under or in pursuance of any decree or order of such court, together with an office copy of such decree or order and such certificate of payment as is hereinafter mentioned, may, for the purpose of bringing land under this Act, be deemed by the commissioner sufficient evidence of the title of the purchaser to such land, subject to any estate or interest appearing by the decree or order or order of confirmation, or subsequently created and registered. Every order of confirmation of a purchase which hereafter is made shall be drawn up so as to refer to a schedule thereto, containing the name and addition of the purchaser, and a description of the land purchased by him; and the master-in-equity and chief clerk are hereby required, after payment and acceptance of all the money payable in respect of any particular purchase, to give upon any such office copy order of confirmation a written certificate that the purchase money, and all interest in respect thereof, payable by any purchaser named in such certificate for any land therein referred to, has been wholly paid.

46. Whenever the council of any municipality under part XVIII. of the Local Government Act 1915 by order directs that any land taken, purchased, or acquired by them shall be a public highway, and be deemed to be dedicated to the public accordingly, and that any land thereby dedicated to the public shall be in lieu of any existing street or road named in such order, and the Governor in Council has confirmed the same, the publication of such order, together with the confirmation thereof in the Government Gazette, shall have the effect of bringing under the operation of this Act such existing street or road, if not already under this Act, and if an instrument of transfer of such existing street or road under the common seal of such municipality is presented to the registrar, accompanied by the Government Gazette containing the notice required by section 479 of the Local Government Act 1915 the registrar shall proceed to register such transfer, in like manner as if it had been accompanied by a certificate of title in the name of such municipality to the street or road purporting to be so transferred.

PART III. CERTIFICATES OF TITLE AND REGISTRATION.

47. Certificates of title shall be in duplicate in the form in the third schedule hereto; and the registrar shall keep a book to be called the "register book," and shall register or enter by binding up therein

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one of the grants and one of the certificates of title, and shall deliver the other original (hereinafter called the duplicate) to the proprietor. Each grant and certificate shall constitute a separate folium of such book; and the registrar shall endorse thereon, in such manner as to preserve their priorities, the particulars of all dealings and matters affecting the land by this Act required to be registered or entered.

48. [Am. 1916, s. 2]. Every duplicate or special certificate of title hereafter to be issued shall be on parchment or durable paper. One certificate of title may be issued for several parcels of land though the same are not contiguous, if in the opinion of the registrar their relative positions can be sufficiently and conveniently shown upon the plan on the certificate; and in any case in which it is inconvenient to draw the plan in the margin of a certificate, it may be drawn upon the back thereof, or upon a sheet annexed thereto.

49. It shall not be necessary to mention the area of any parcel of land included in a certificate where the area of such parcel is less than one acre, and the omission to refer to the area of the land comprised in a certificate shall not in any case invalidate the certificate.

50. Before the delivery of any duplicate grant or certificate of title, a receipt for it in the handwriting of the proprietor may be required to be signed by him when practicable, so as to prevent as far as may be personation.

51. Every grant and every certificate of title shall be deemed and taken to be registered under this Act when the registrar has marked thereon the volume and folium of the register book in which the same is entered; and every instrument purporting to affect land under the operation of this Act shall be deemed and taken to be registered when a memorial thereof as hereinafter described has been entered in the register book upon the folium constituted by the grant or existing certificate of title; and the person named in any grant, certificate of title, or instrument so registered as the grantee, or as the proprietor of or having any estate or interest or power, shall be deemed and taken to be the duly registered proprietor thereof.

52. Every transfer of a mortgage or charge, and every transfer or mortgage of a lease or sub-lease, shall notwithstanding the provisions of the last preceding section, be deemed and taken to be duly registered when a memorial thereof as described in section 58 has been endorsed on the mortgage, charge, lease, or sub-lease respectively so transferred or mortgaged, and it shall not be necessary to enter such memorial in the register book upon the folium constituted by the grant or existing certificate of title; and in every case where before the eighth day of November, 1904, such a memorial as aforesaid has been endorsed upon any mortgage, charge, lease, or sub-lease, but not entered in the register book upon the folium constituted by the grant or certificate of title, such endorsement shall be, and shall be held to have been from the time such endorsement was made, a valid and effectual registration of the transfer or mortgage specified in such memorial, and in all respects and for all purposes shall be of the same effect as if at the time such endorsement was made a memorial of such transfer or mortgage had been entered in the register book upon the folium constituted by the grant or certificate of title.

53 [Am. 1916, s. 3]. Every instrument for registration (other than a transfer) may be in duplicate, and shall be registered in the order

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of and as from the time at which the same is produced for that purpose; and instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the date of registration, and not according to the date of the instrument. Upon the registration of any instrument in duplicate, the registrar shall bind up one original in the register book, and shall deliver the other (hereinafter called the duplicate) to the person entitled.

54. Any lease or mortgage presented for registration may be in triplicate, and upon the registration thereof as provided by the last preceding section, the parts not retained shall be delivered to the person presenting the lease or mortgage for registration; but in every case of registration in triplicate the word triplicate shall be perforated through each instrument, and the words "lessor's part" shall be perforated through one lease, and the words "lessee's part" through the other of the two leases returned, and the words "mortgagor's part" shall be perforated through one mortgage, and the words "mortgagee's part" through the other of the two mortgages returned.

55. The registrar shall not enter in the register book notice of any trust, whether express, implied or constructive; but trusts may be declared by any document, and a duplicate or an attested copy thereof may be deposited with the registrar for safe custody and reference; and the commissioner, should it appear to him expedient so to do, may protect in any way he deems advisable the rights of the persons for the time being beneficially interested thereunder, or thereby required to give any consent; but the rights incident to any proprietorship, or any instrument, dealing, or matter registered under this Act, shall not be in any manner affected by the deposit of such duplicate or copy, nor shall the same be registered.

56. After the passing of this Act any transfer, lease, mortgage, or charge under the provisions of this Act may be executed to the trustees for the time being of any trust registered under the provisions of part III. of the Trusts Act 1915, describing them as such trustees as aforesaid, and stating that the trust is registered under the provisions of the said part, and describing such trust so as to identify it with the description of the same in the register of successory trusts, and a certificate of title may be issued to such trustees by the same description, but no such description shall be deemed to affect any person with notice of the trusts, or entitle, require, or concern any person to inquire into or ascertain such trusts; and the persons for the time being registered as trustees of such trust in the register of successory trusts shall be deemed the registered proprietors of the property comprised in such transfer, lease, mortgage, charge, or certificate of title.

57. No instrument affecting land of which any person is registered as proprietor under this Act, or any memorial of any such instrument, shall be registered under part XIII. of the Real Property Act 1915; and such part so far as it relates to any land which is under the operation of this Act shall be and be deemed to be of no force or effect whatever.

58 [1916, s. 4]. Every memorial entered in the register book shall state the nature of the instrument to which it relates, the time of the production of such instrument for registration, the name of the party to whom the same is given, and shall refer by number or symbol to such instrument, and shall be signed by the registrar.

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59. Whenever a memorial of any instrument has been entered in the register book, the registrar shall (except in cases wherein the entire land contained in any grant or certificate is transferred) enter the like memorial on the duplicate grant or certificate, and on the duplicate instrument (if any), unless the production of the same is dispensed with as hereinafter provided; and he shall endorse on every instrument registered a certificate of the time at which the memorial was entered in the register book, and shall authenticate such certificate by signing his name thereto; and such certificate shall be received in all courts of law and equity as conclusive evidence that such instrument has been duly registered.

[60: V. 1890, s. 62, Aust. Torr. Syst. 515.]

61. No instrument, until registered in manner herein provided, shall be effectual to pass any estate or interest in any land under the operation of this Act, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass, or (as the case may be) the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and if two or more instruments signed by the same purprietor, and purporting to affect the same estate or interest, are at the same time presented to the registrar for registration, he shall register and endorse that instrument which is presented by the person producing the duplicate grant or certificate of title.

62. The proprietor of land under the operation of this Act shall be entitled to receive a certificate of title to the same; and if any certificate is issued to a minor, or to a person under any other disability, the registrar shall state the age of such minor, or the nature of the disability, so far as known to him.

63. Two or more persons who are registered as joint proprietors of land shall be deemed to be entitled to the same as joint tenants; and in all cases where two or more persons are entitled as tenants in common to undivided shares of or in any land, such persons may receive one certificate for the entirety, or separate certificates for the undivided shares.

64. Upon the transfer of any land, and upon the lease of any freehold land, to two or more persons as joint proprietors with the words "no survivorship" endorsed thereon, the registrar shall enter such words in the memorial of such transfer or lease, and also upon any certificate of title issued to such joint proprietors pursuant to such transfer, and sign his name thereto. Two or more joint proprietors of any land, or of any suchlease, or of any charge, may by writing under their hands direct the registrar to enter the words "no survivorship" upon the grant, certificate of title, or instrument relating to the property. In every case after such words have been signed by the registrar, whether under this or any preceding section, it shall not be lawful for any persons other than the proprietors registered to transfer or otherwise deal with the property without the order of the Supreme Court or a judge thereof obtained on motion or petition, or the order of the commissioner.

65. Before making any such order, the court or judge or commissioner shall cause notice of the intention so to do to be advertised once at least in one newspaper published in the city of Melbourne, or

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circulating in the neighbourhood of the land, and shall appoint a time within which it shall be lawful for any person interested to show cause against such order being made; after the expiration of which time it shall be lawful for the said court or judge or commissioner to give directions for the transfer of such land or lease or charge to any new proprietor or proprietors, solely or jointly with or in the place of any existing proprietor, or proprietors, or to make such order in the premises as is just for the protection of any persons beneficially interested in such property, or in the proceeds thereof; and on such order being deposited with the registrar he shall make such entries and perform such acts for giving effect thereto as the provisions of this Act render necessary.

66. The commissioner, in any case within the 64th section in which members of friendly societies are interested, may before making an order thereunder dispense with the advertisement required by the 65th section.

67. No certificate of title issued upon an application to bring land under this Act, or upon an application to be registered as proprietor on a transmission, shall be impeached or defeasible by reason or on account of any informality or irregularity in the application, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts of law and equity as evidence of the particulars therein set forth, and of the entry thereof in the register book, and shall be conclusive evidence that the person, named in such certificate as the proprietor of, or having any estate or interest in or power to appoint or dispose of, the land therein described, is seised or possessed of such estate or interest, or has such power.

68. Whenever any certificate of title or any duplicate thereof, either already registered or issued or hereafter to be registered or issued under any of the provisions or otherwise under the operation of this Act, contains any statement to the effect that the person named in the certificate is entitled to any easement therein specified, such statement shall be received in all courts of law and equity as conclusive evidence that he is so entitled.

69. Whenever any such certificate of title as aforesaid contains the words "Together with a right of carriage-way over " [*specifying or describing the road or roads over which the easement is created, and referring to a map endorsed whereon such road or roads is or are coloured brown*] such words shall have the same effect and shall be construed as if there had been inserted in such certificate of title the words contained in the fifth schedule.

70. The third schedule shall be deemed to extend to the setting forth of the easements mentioned in the two last preceding sections.

71. In any action for specific performance, or in any action for damages, brought by a proprietor of any land under the operation of the Real Property Act No. 140, or of the Transfer of Land Statute, or of the Transfer of Land Act 1890, or of this Act, against a person who has contracted to purchase such land, not having notice of any fraud or other circumstances which according to the provisions of the said Acts or any of them would affect the right of the vendor, the certificate of title of such proprietor shall be held to be conclusive evidence that such proprietor has a good and valid title to the land for the estate or interest therein mentioned or described, and shall in any such suit

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entitle such proprietor to a decree for the specific performance of such contract.

72. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from his Majesty or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same subject to such incumbrances as are notified on the folium of the register book constituted by the grant or certificate of title; but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title, and except as regards any portion of land that by wrong description of parcels or boundaries is included in the grant, certificate of title, or instrument evidencing the title of such proprietor, not being a purchaser for valuable consideration or deriving from or through such a purchaser: provided always that the land which is included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions, and powers (if any) contained in the grant thereof, and to any rights subsisting under any adverse possession of such land, and to any public rights of way, and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land, and to any unpaid rates and other moneys which, without reference to registration under this Act, are by or under the express provisions of an Act of Parliament declared to be a charge upon land in favour of any responsible minister, or any government department or officer, or any public corporate body, and to any leases, licences, or other authorities granted by the Governor in Council, or any responsible minister, or any government department or officer, or any public corporate body, and in respect of which no provision for registration is made, and also where the possession is not adverse to the interest of any tenant of the land, notwithstanding the same respectively are not specially notified as incumbrances on such certificate or instrument.

73 [Am. 1916, s. 5]. Notwithstanding the reservation in the last preceding section of any easements, subsisting over or upon or affecting any land comprised in any grant or certificate of title, the registrar shall specify upon any future certificate of such land and the duplicate thereof, as an incumbrance affecting the same, any subsisting easement over or upon or affecting the same which appears to have been created by any deed or writing.

[74-76: V. 1890, ss. 76-78, Aust. Torr. Syst. 519.]

77. Upon production of a receipt of the treasurer of Victoria for the full purchase money of any land sold by his Majesty in fee, together with an instrument dealing with such land signed by the purchaser, the registrar shall endorse upon such receipt such memorial as he is herein required to enter in the register book upon the registration of any dealing of a like nature with land registered, and shall sign such endorsement, and shall endorse such instrument with the certificate of registration herein required on the registration of a like instrument after a grant has been registered, and so on from time to time with respect to any other dealings before the registration of the grant; and every such instrument shall thereupon be held to be duly registered under this Act. The registrar shall file such receipt and instrument in the office, and upon the registration of the grant of the

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land he shall enter thereon a memorial of every dealing endorsed on such receipt, and issue a certificate of title to the then transferee of the land (if any).

78. The registrar with the consent of the commissioner may dispense with the production of any duplicate grant, certificate of title, or duplicate instrument (if any), for the purpose of entering thereon the memorial by this Act required. In every such case upon the registration of the dealing, the registrar shall notify in the memorial in the register book that no entry of such memorial has been made on the duplicate, and such dealing shall thereupon be as valid and effectual as if such memorial had been entered thereon. The registrar may with the like consent dispense with the production of the duplicate grant or certificate of title required to be delivered up prior to the registration of a devisee or other person on the transmission of an estate of freehold: provided always that before registering such dealing or transmission the registrar shall require proof by statutory declaration that the duplicate is not deposited or held as a security or lien, and shall give at least fourteen days' notice of his intention to register such dealing in at least one newspaper published in the city of Melbourne, or circulating in the neighbourhood of the land.

79. [1916, s. 6]. In the event of the duplicate grant or certificate of title being lost or destroyed, an application may be made to the commissioner for the issue of a new certificate of title, and the commissioner may, on proof to his satisfaction of the loss or destruction of the duplicate grant or certificate of title, direct the registrar to cancel the grant or certificate of title for the land then comprised in the grant or certificate of title the duplicate whereof has been lost or destroyed, and to issue a new certificate of title for such land: provided that the registrar before issuing such new certificate shall give at least fourteen days' notice of his intention so to do in at least one newpspaper published in the city of Melbourne, or circulating in the neighbourhood of the land.

80. In case it appears to the satisfaction of the registrar that any certificate of title or instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any grant, certificate of title or instrument, or that any grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or that any grant, certificate, or instrument is fraudulently or wrongfully retained, he may by writing require the person to whom such document has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected or given to the proper party, as the case requires; and in case such person refuses or neglects to comply with such requisition, the registrar may apply to a judge to issue a summons for such person to appear before the Supreme Court or a judge, and show cause why such grant, certificate, or instrument should not be delivered up for the purpose aforesaid; and if such person when served with such summons neglects or refuses to attend before such court or a judge thereof at the time therein appointed, it shall be lawful for a judge to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the Supreme Court or a judge for examination.

81. Upon the appearance before the court or a judge of any person summoned or brought up by virtue of a warrant as aforesaid, it shall

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be lawful for the court or judge to examine such person upon oath, and (in case the same seems proper) to order such person to deliver up such grant, certificate of title, or instrument as aforesaid; and upon refusal or neglect by such person to deliver up the same pursuant to such order, to commit such person to gaol for any period not exceeding six months, unless such grant, certificate, or instrument is sooner delivered up; and in such case, or in case such person cannot be found so that a requisition and summons may be served upon him as hereinbefore directed, the registrar shall (if the circumstances of the case require it) issue to the proprietor of the land such certificate of title as is herein provided to be issued in the case of any duplicate grant or certificate of title being lost or destroyed, and shall enter in the register book notice of the issuing of such certificate, and the circumstances under which the same was issued.

82. Every draft certificate of title from which an original certificate is drawn shall be completed so as to accord in all particulars with the certificate, and shall be preserved in the office until the cancellation of the certificate; and at the time at which the certificate is registered a corresponding number to that upon the certificate shall be put upon the draft, and the draft shall be signed by the person signing the certificate; and in the event of any original grant or certificate being lost or destroyed, or so obliterated as to become illegible, the commissioner may cause another certificate to be prepared from the draft, and to be endorsed with all such entries as were upon the original, so far as the same can be ascertained from the records of the office and inspection of the duplicate, and shall make and sign a memorandum upon such document stating that the same is a substituted certificate to be used in place of the original, and what has become of the original so far as known or supposed, and from the date of such copy being so signed the same may be bound up in the register book, and used in place of the original for the purpose of dealings and transmissions. If the draft cannot be found, the commissioner shall be at liberty to prepare the substituted certificate from the duplicate or such other evidence as is available as to the contents of the original. Notwithstanding anything contained in this section, it shall not be necessary that there shall appear or be shown on the draft certificate of title from which an original is drawn as provided in this section the map referred to in the certificate as "the map in the margin" thereof.

83. On any transfer by a sheriff or mortgagee to a purchaser, or under any decree, judgment, or order of the Supreme or County Court of any land, estate, or interest under this Act, or for the purpose of registering any instrument subject to a first mortgage, or for the purpose of rectifying or cancelling any certificate under the provisions of this Act, or for the purpose of inspection in case of loss, destruction, or obliteration of any original grant or certificate of title, the registrar shall by writing under his hand require the judgment debtor, mortgagor, or mortgagee or proprietor of the land comprised in any duplicate or triplicate grant, certificate, mortgage, lease, or other instrument, or the person having the possession, custody, or control of any such duplicate or triplicate, to bring the same into the office of titles within a period named in such requisition, not less than seven days from the date thereof, to be endorsed, cancelled, rectified, or otherwise dealt with as the case requires.

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84. If any person refuses or neglects to comply with any such requisition as aforesaid, the registrar or any person interested may apply to a judge to issue a summons for such person to appear before the court or a judge, and show cause why the document mentioned in such requisition should not be delivered up or produced for the purpose mentioned in such requisition; and upon appearance before the court or a judge of any person so summoned, it shall be lawful for the court or judge to examine such person upon oath and to receive other evidence, or if he does not appear after being duly served with such summons, then to receive evidence in his absence, and (in case the same seems proper) to order such person to deliver up such document upon such terms or conditions as to such court or judge seems fit, and the costs of the summons and proceedings thereon shall be in the discretion of the court or judge.

85. Lists of certificates of title called in for cancellation or rectification, and not brought in, shall be exhibited in the office of titles, and shall be advertised in the Government Gazette and in such newspapers and at such time or times as the registrar thinks fit.

86. Every certificate of any person or corporation sole, being the proprietor of an estate in fee simple, whether in possession, remainder, or reversion, and every instrument transferring or creating such an estate to or in favour of any person or corporation sole, shall imply and be deemed to include the heirs of such person, or the successors of such corporation.

PART IV. TITLE BY POSSESSION TO LAND UNDER THE ACT. REMOVAL OF ABANDONED EASEMENTS.

87. A person who claims that he has acquired a title by possession to land registered under this Act may apply to the commissioner for an order vesting the land in him for an estate in fee simple, or other the estate claimed.

88. Every such application shall—

(*a*) be in writing in the form or to the effect of the sixth schedule, and shall include the several particulars therein mentioned or referred to;

(*b*) be signed by the applicant, or in the case of a corporation by a person authorized in that behalf in writing nnder the seal of the corporation;

(*c*) be attested by at least one witness, being a person mentioned in that behalf in the sixth schedule;

(*d*) operate and be taken in law as a statutory declaration by the person signing it that the several statements therein are true; and

(*e*) be accompanied by a plan of survey (with field notes) of the land, certified by a surveyor licensed under the Land Surveyors Act 1915.

89. (1) The registrar shall refer each application to an examiner of titles who shall report thereon to the commissioner.

(2) The commissioner may thereupon in his discretion reject the application altogether or in part, or may make such requisitions as to the title claimed to have been acquired, or as to any other matter relating to the application, as he thinks fit.

90. If an application is not rejected by the commissioner as aforesaid, he shall direct that notice thereof be advertised (once at least)

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in a newspaper named by him published in the city of Melbourne, or published and circulating in the neighbourhood of the land, and be given to any person or persons named by him; and notice thereof shall be given to every person appearing by the register book to have any estate or interest in the land, or in any incumbrance notified on the title thereof.

91. The applicant shall cause a copy of the notice of application to be posted in a conspicuous place on the land, or at such place as the commissioner directs, and to be kept so posted for not less than twenty-one days prior to the granting of the application.

92. The commissioner shall appoint a term, not less than twenty-one days nor more than twelve months from the publication of the advertisement or service of the notice, at or after the expiration of which he may, unless a caveat is lodged forbidding the same, grant the application altogether or in part.

93. (1) The notice shall—

(*a*) specify the volume and folium of the Crown grant or certificate of title affected by the application, and any mortgage, charge, or lease registered as an incumbrance thereon; and

(*b*) be dated, and be served by being sent in a registered letter marked outside "Office of Titles," posted to each person to be served, at his address (if any) stated in the register book or supplied by the applicant.

(2) The registrar shall cause a copy of each notice to be filed with a memorandum of the same having been sent, and the memorandum shall be sufficient evidence that the notice was duly sent.

94. At any time prior to granting an application the commissioner may in his discretion, notwithstanding any direction previously given by him as to the application, reject the same altogether or in part if the applicant fails to comply to his satisfaction with any requisition made by him within such time as to him seems reasonable.

95. (1) A person claiming any estate or interest in the land in respect of which any such application is made may, before the granting thereof, lodge a caveat with the registrar forbidding the granting of the application.

(2) The caveat shall in all other respects be in the same form, be subject to the same provisions, and have the same effect with respect to the application against which it is lodged, as a caveat against bringing land under the operation of this Act.

96. Subject as aforesaid, after the expiration of the time appointed the commissioner, if satisfied that the applicant has acquired a title by possession to the land, may make an order vesting the land in the applicant (or person entitled thereto) for an estate in fee simple, or other the estate required by the applicant, free from all incumbrances appearing by the register book to affect the existing title which have been determined or extinguished by such possession, and free from any easement notified as an incumbrance which has been proved to the satisfaction of the commissioner to have been abandoned by evidence of non-user for a period of not less than thirty years.

97. Where a vesting order is made the commissioner shall direct the registrar—

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(*a*) to cancel the existing Crown grant or certificate of title, and any instrument, entry, or memorial in the register book, altogether or to such extent as is necessary to give effect to such vesting order; and

(*b*) to issue to the applicant, or person entitled to receive the same, a new certificate of title for an estate in fee simple, or other the estate acquired in the land comprised in such vesting order, free from all such incumbrances as aforesaid, and the registrar shall comply with the directions.

98. Upon granting the application, the commissioner may grant the same conditioned upon the applicant contributing to the assurance fund such sum of money as the commissioner certifies to be in his judgment a sufficient indemnity, by reason of the imperfect nature of the evidence of title, or as against any uncertain or doubtful claim or demand incident to or which may arise upon the title, or any risk to which the assurance fund may be exposed by the granting of the application.

99. Where a vesting order is made by the commissioner, the registrar shall on such order being lodged with him make the entries directed to be made by section 227 of this Act in the case of the vesting orders therein mentioned, and the making or omission to make such entries shall be attended by the same results as declared by the said section in respect of the vesting orders therein mentioned.

100. In cancelling any Crown grant, certificate of title, instrument, or any memorial or entry in the register book, in pursuance of the direction in that behalf, the registrar shall endorse thereon a memorandum stating the circumstances and authority under which the cancellation is made.

101. (1) Any certificate of title issued by the registrar in pursuance of such order shall be issued and registered in manner prescribed by section 47 of this Act, and thereupon the person named therein shall become the registered proprietor of the said land.

(2) The certificate shall be dated the date of the lodgment with the registrar of such order.

102. (1) A proprietor of land may apply to the commissioner for the removal from the certificate of title of any easement of way notified thereon as an incumbrance.

(2) The application shall be in writing and dated, and shall be signed by the applicant.

(3) The commissioner, on being satisfied that the easement has not been used or enjoyed for a period of not less than thirty years, may make an order directing the removal of the incumbrance, and thereupon the easement shall be deemed to have been abandoned and extinguished.

(4) An order shall not be made until the expiration of twenty-one days after notice of the application has been given by the registrar to every person appearing by the register book to have any estate or interest in the land to which the easement is appurtenant, and also to any other person named by the commissioner.

(5) The notice shall be in writing and dated, and shall include or contain a skeleton plan showing the extent to which such easement is affected.

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(6) The notice shall be served by being sent in a registered letter to each person to be served, at his address appearing in the register book, or in the case of any person named by the commissioner at the address supplied by the applicant for that purpose.

(7) The registrar shall cause a copy of each notice to be filed with a memorandum of the same having been sent, and the memorandum shall be sufficient evidence that the notice was duly sent.

103. (1) If a vesting order, or an order for the removal of an incumbrance, is made by the commissioner under this part of this Act, and affects the right, estate, or interest of the registered proprietor of land included in any certificate of title in respect of any registered easement appearing thereon, the commissioner shall direct the registrar to cancel such easement to the extent to which it has been determined or extinguished upon the original of such certificate, and also upon the duplicate certificate when brought to him for that purpose, or when the same is lodged in the office of titles for the purpose of any dealing with the land comprised therein.

(2) The registrar may call in such duplicate certificate for the purpose of such cancellation, and may detain the duplicate until such cancellation is effected, and refuse to register any dealing with the land, or any estate or interest therein, until the duplicate has been so brought in or lodged.

104. Any certificate of title, entry, removal of incumbrance, or cancellation in the register book, procured or made by fraud shall be void as against all parties or privies to such fraud.

PART V. ROADS, PASSAGES, ETC.

105. Where a block of land not Crown land has been subdivided into allotments by the owner or registered proprietor of the fee simple, and such subdivision includes any private road, street, or passage created and dedicated solely for and to the use and convenience of the owners or occupiers of the subdivisional allotments of such block, and subsequently to such subdivision the fee of all the land abutting upon such road, street, or passage has been sold and conveyed or transferred to the purchasers thereof, but the fee of such road, street, or passage remains outstanding in the owner or registered proprietor who made such subdivision, or in his legal representatives or persons claiming under him or them other than such purchasers as aforesaid, and is subject to no easements of right of way other than the easements of right of way appurtenant to the land comprised in the said block, or to particular portions thereof, the person (if only one) or all the persons (if more than one) solely or collectively entitled as owner or owners, registered proprietor or proprietors, to the fee simple of the whole of the land abutting upon such road, street or passage, and of every other portion of the said block (if any) to which such easements for the time being are appurtenant, shall, for the purpose of making an application under section 109, be deemed solely or collectively (as the case may be) the owner or owners of the fee simple in equity of such road, street or passage, subject to subsisting easements and incumbrances, and the person or persons in whom the fee of such road, street, or passage remains outstanding be deemed to hold the same in trust for such equitable owner or owners.

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106. Where any private road, street, or passage exists on land not Crown land, and the owner or owners, registered proprietor or proprietors, of the fee simple of all the land abutting upon such road, street, or passage, solely (if only one) or collectively (if more than one), is or are the only person or persons entitled to easements over such road, street or passage, but the fee of such road, street, or passage is outstanding in some person or persons other than such owner or owners, registered proprietor or proprietors, as aforesaid, such owner or owners, registered proprietor or proprietors, shall, for the purpose of making an application under section 109, be deemed solely or collectively (as the case may be) the owner or owners of the fee simple in equity of such road, street or passage, subject to subsisting easements and incumbrances, and the person or persons in whom the fee of such road, street, or passage is outstanding be deemed to hold the same in trust for such equitable owner or owners.

107. When any private road, street, or passage on land not Crown land is a cul-de-sac, the person (if only one) or all the persons collectively (if more than one) who is or are the owner or owners, registered proprietor or proprietors, of the fee simple of all land abutting upon such road, street or passage, and who has or have an easement or easements of right of way thereover shall, where the fee of such road, street, or passage is in some other person or persons, be (for the purpose of making an application under section 109 of this Act) deemed solely or collectively (as the case may be) the owner or owners of the fee simple in equity of such road, street or passage, subject to no other easements of right of way than those created or reserved in favour of such last-mentioned owner or owners, and the person or persons in whom the fee is legally vested be deemed to hold the same in trust for such equitable owner or owners. And where such fee is already in an owner or owners, registered proprietor or proprietors, of land so abutting as aforesaid, he or they shall in the discretion of the commissioner be and be deemed entitled thereto subject to no easements of right of way other than the easements created or reserved in favour of such person or persons as is or are owner or owners, registered proprietor or proprietors, of land abutting as aforesaid, and to have the certificate of title issued to or already held by him or them free or freed from all easements or right of way other than as aforesaid. In this and the next succeeding section "private road, street or passage" includes any land described as a road by the owner in fee thereof, in any conveyance in which he granted an easement of way over such land, notwithstanding that no such road existed or exists on such land.

108. (1) Where in the case of any private road, street, or passage which is itself a cul-de-sac and situate on land not Crown land, any portion of such road, street, or passage is in relation to the remainder thereof of the nature of a cul-de-sac, such portion shall for the purposes of this part be deemed to be a cul-de-sac within the meaning of the last preceding section, whether or not such road, street, or passage has been dealt with under the provisions of this part, or any corresponding provisions previously in force relating to a cul-de-sac.

(2) Where the owner or registered proprietor of the fee simple of the terminal portion of a cul-de-sac within the meaning and operation of the last preceding section is also the owner or registered proprietor of the fee simple of all the land abutting on the closed end

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and sides of that terminal portion, subject only to the then subsisting easements of right of way thereover, such portion shall of itself apart from the remainder of the cul-de-sac of which it is a portion be and be deemed a cul-de-sac within the meaning and operation of the last preceding section, whether or not the cul-de-sac of which it is a portion has been previously dealt with under the provisions of this part, or under any corresponding provisions previously in force relating to a cul-de-sac; and such owner or registered proprietor shall be entitled to apply under section 109 to bring such portion under the operation of this Act, or for a vesting order when such portion is already under the operation of this Act; and in the discretion of the commissioner shall be and be deemed entitled thereto subject to no easement of right of way, and to have the certificate of title issued to or already held by him free or freed from all easements of right of way then subsisting.

109. Where the fee of such road, street, or passage has not been brought under the operation of this Act, the person (if only one) or all the persons (if more than one) by any of the four last preceding sections declared to be for the purpose therein mentioned solely or collectively the owner or owners of the fee simple in equity of such road, street or passage, shall be entitled to apply under section 18 to bring the land constituting such road, street, or passage under the operation of this Act, and for the issue of a certificate of title to him or them, or as he or they shall direct, either free from or subject to such subsisting easements, and where the land constituting such road, street, or passage is already under the operation of this Act, such person or persons as aforesaid shall be entitled to apply to the commissioner for a vesting order vesting the fee in him or them, and to be registered in the register book as the proprietor or proprietors of an estate in fee simple of the land constituting such road, street or passage, either free from or subject to such subsisting easements.

110. Upon every such application as aforesaid, whether to bring such land under the operation of this Act or to procure such vesting order as aforesaid, the commissioner shall direct notice of the application to be advertised once at least in one newspaper published in the city of Melbourne, or circulating in the neighbourhood of the land, and to be served on any persons named by him, and shall appoint a time not less than fourteen days nor more than twelve months from such notice, or from the advertisement or the first of such advertisements (if more than one), on or after the expiration of which the registrar may, unless a caveat is lodged forbidding the same, proceed with the bringing of the land under the operation of this Act, or with the registration of the applicant or applicants (as the case may be).

111. The registrar shall under such direction as aforesaid cause notice to be published in such manner as by such direction may be prescribed, and shall cause a copy of such notice to be posted in a conspicuous place in the office of titles, and shall send through the post office a registered letter marked outside "Office of Titles" containing a copy of such notice addressed to every person whom the commissioner has directed to be served with notice, and to the persons stated in the application, or ascertained to be, the owners or occupiers of any and every portion of the land abutting on any road, street, or passage included in the application, and to every person appearing on the register in the office of the registrar-general, or in the register book

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in the office of titles, or by the application, to have a subsisting estate or interest in the land included in such application, or to have any estate or interest as mortgagee or lessee in any land abutting upon or having an appurtenant easement over such road, street or passage, also to the council of the municipality in which such road, street, or passage is situate. Such letter, in the case of persons appearing upon any such register as aforesaid, shall be addressed to the address (if any) appearing upon such register, and every such notice so as aforesaid sent by post shall be accompanied by a skeleton plan showing the position and dimensions of the road, street, or passage included in or affected by such application.

112. Any application under section 109 of this Act, where the road, street, or passage is under the operation of this Act, shall be made in writing signed by the applicant or applicants, and in addition to the other facts material to the application shall state the names and present addresses of the owners and occupiers of every portion of the said block, where the case is within section 105, or of every portion of abutting land where the case is within section 106 or section 107, also the value of the land comprised in the application. All allegations of fact in such application shall be verified by statutory declaration. The duly authorized attorney of any corporation may make or join in such application for or on behalf of the corporation, and may subscribe the application in his own name, and make all requisite declarations to the best of his knowledge, information and belief.

113. Every application made under section 109 shall, subject to any express provisions of this part, be made, prosecuted, and dealt with, and fees be chargeable and applied, in manner prescribed by this Act for applications of a similar nature, and the persons making the same shall be deemed within and subject to the provisions of this Act affecting such applicants.

114. Any person claiming any estate or interest in or easement over the land in respect of which any such application is made as hereinbefore provided may, before the granting thereof, lodge a caveat with the registrar forbidding the granting of the application; and every such caveat shall in all other respects be in the same form, subject to the same provisions, and shall have the same effect with respect to the application against which it is lodged, as an ordinary caveat against bringing land under the operation of this Act, or against registration of any change in proprietorship lodged under the provisions of this Act.

115. The commissioner, in dealing with any application made under section 109, may make such requisitions as to title or otherwise as he thinks fit, and may in his discretion grant such application altogether or in part, and in pursuance thereof direct the land to be brought under the operation of this Act, or make such vesting order in the premises as the circumstances of the case require, and the registrar on being served with such vesting order shall make the entries directed to be made by section 227 in the case of the vesting orders therein mentioned, and the making or omission to make such entries shall be attended by the same results as declared by the said section in respect of the vesting orders therein mentioned; or the commissioner may in his discretion reject any such application altogether or in part.

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116. Before granting any application under section 109, the commissioner shall determine what amount will in his judgment be an equitable compensation to the person or persons in whom the fee of such road, street, or passage is outstanding, for the extinguishment of his or their estate and interest therein, and for that purpose may require the applicant or applicants to produce to him such evidence by statutory declaration or otherwise as he thinks necessary to assist him in determining such amount, and it shall be lawful for any person appearing or claiming to be entitled to such compensation to submit to the commissioner, at any time before the granting of such application, evidence as to the then value of such estate and interest.

117. When the commissioner has determined the amount of compensation he shall certify to such amount under his hand, and the granting of the application in respect of which such compensation has been determined shall be conditional upon the applicant paying the amount thereof to the person or persons entitled thereto, or if such person or persons has or have not been ascertained, or cannot be found, or refuses or refuse to receive or acknowledge such payment, or if the commissioner so directs, then conditional upon the applicant paying such amount into the assurance fund; and no title shall issue or be registered in pursuance of such application until such payment has been made.

118. When the compensation moneys have been paid into the assurance fund under the last preceding section, any person thereafter claiming to be entitled thereto or to any portion thereof may submit such claim in writing to the commissioner, supporting the same by statutory declaration, and such other evidence as the commissioner may require, and if the commissioner admits the claim altogether or in part and certifies accordingly to the attorney-general, the Governor in Council may thereupon issue a warrant to the treasurer for payment of the amount so certified out of the assurance fund: provided nevertheless that no such claim shall lie or be sustained, unless made in manner aforesaid within the period of six years from the date of the order granting the application in respect of which such moneys were paid into the assurance fund.

119. Upon granting any application made under section 109, the commissioner may grant the same conditioned upon the applicant contributing to the assurance fund, in addition to the sum to be paid by way of compensation, such a sum of money as the commissioner certifies under his hand to be in his judgment a sufficient indemnity, by reason of the imperfect nature of the evidence of title, or as against any uncertain or doubtful claim or demand incident to or which may arise upon the title, or any risk to which the assurance fund may be exposed by the granting of the application.

120. Any person sustaining loss or damage, in or by the exercise by the commissioner of any of the powers in this part conferred on him, shall have all the rights and remedies in respect of such loss or damage as are secured by section 252 to the persons sustaining loss and damage within the meaning of that section, subject to the conditions and restrictions therein and herein expressed or implied, and all damages and costs so recovered against the registrar in any action respecting such loss or damage may be recovered out of the assurance fund.

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PART VI. DEALINGS WITH LAND.

Division 1. Transfers.

121. The proprietor of land, or of a lease, mortgage or charge, or of any estate, right, or interest therein respectively, may transfer the same by a transfer in one of the forms in the seventh schedule, provided that where the consideration for a transfer does not consist of money, the words "the sum of" in the forms of transfer contained in the seventh schedule shall not be used to describe the consideration, but the true consideration shall be concisely stated; and a woman entitled to any right or contingent right to dower in or out of any freehold land shall be deemed a proprietor within the meaning hereof. Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he is entitled or able to transfer or dispose of under any power, with all rights, powers, and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, or the original lessee, mortgagee or annuitant.

122. By virtue of every such transfer as is herein mentioned the right to sue upon any mortgage or other instrument, and to recover any debt, sum of money, annuity or damages thereunder (notwithstanding the same is deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity or damages, shall be transferred, so as to vest the same at law as well as in equity in the transferee thereof: provided always that nothing herein contained shall prevent a court of equity from giving effect to any trusts affecting such a debt, sum of money, annuity or damages, in case the transferee as between himself and any other person holds the same as a trustee.

123. The proprietor of land, or of any estate or interest in land, under the operation of this Act, whether of the nature of real or personal property, may transfer such land, estate, or interest to his wife; or if such proprietor be a married woman, it shall be lawful for her to make such transfer to her husband; or it shall be lawful for such proprietor to make such transfer directly to himself and another person, or jointly with any other person to himself alone, or to create or execute any power of appointment or disposition, or to create or limit estates in remainder or otherwise as legal estates, of or concerning land the subject thereof without the intervention of any precedent or particular estate, and also like estates as legal estates without the employment or intervention of any form of use; and upon the registration of such transfer the land, estate, or interest shall vest in the transferee solely or jointly (as the case may be), or in the person in whose favour any such power has been executed, or taking under any such limitation or otherwise, according to the intent and meaning of such instrument; and she, he, or they shall become and be deemed the proprietor or proprietors thereof.

124. Every transfer or other instrument shall be deemed of the same efficacy as if under seal; and when signed by the proprietor, and registered, shall be as valid and effectual to all intents and purposes for

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conveying, passing, or conferring the estates, interests, or rights expressed to be thereby transferred, leased, or created respectively, as a deed duly executed and acknowledged by the same person would have been under any law heretofore or now in force in Victoria, or as any other form of document would have been either at law or in equity; and every instrument acknowledged within Victoria by any woman appearing by the register book to be married (whether a sole proprietor or not), and certified under the hand of the registrar, or of some assistant registrar, or perpetual commissioner, in the form in the eighth schedule, and every instrument acknowledged out of Victoria by any woman appearing by the register book to be married (whether a sole proprietor or not), and certified under the hand of a special commissioner or other authorized person in the form in the said schedule, shall, when such instrument has been registered, be as valid and effectual to all intents and purposes as a deed duly executed and acknowledged, or an instrument duly signed and acknowledged, by her would have been under any law heretofore or now in force in Victoria, or as any other form of document would have been either at law or in equity; and such certificate shall be deemed and received as sufficient evidence of the due signature and acknowledgment by her of the instrument therein referred to: provided always that a married woman entitled to her separate use, and not restrained from anticipation, or having a power of appointment, shall for the purposes of this Act be deemed a feme sole.

125 [Am. 1916, s. 7]. If the transfer purports to transfer the whole or part of the land mentioned in any grant or certificate of title, the transferor shall deliver up the duplicate grant or certificate; and the registrar shall after registering the transfer endorse on the grant or certificate a memorandum cancelling the same, either wholly or partially, according as the transfer purports to transfer the whole or part of the land; and the duplicate of any wholly cancelled grant or certificate shall be retained by him; and the duplicate of any partially cancelled grant or certificate shall be returned endorsed as aforesaid to the transferor; and the registrar shall make out to the transferee a certificate of title to the land mentioned in such transfer, and (whenever required by the proprietor of the untransferred portion) shall make out to such proprietor a certificate of title to such portion: provided always that if the land is leasehold, the lease and duplicate shall not be cancelled; and the latter document instead of being retained shall be delivered to the transferee, if the whole of the land affected by the lease is transferred, otherwise the lease shall be returned to the person lodging the same: provided further that the registrar may at his discretion, instead of returning a partially cancelled grant or certificate to the transferor, require the transferor to take out a new certificate for the land still comprised in such partially cancelled grant or certificate.

126 [Am. 1916, s. 8]. If a transfer purports to transfer the whole of the land mentioned in any grant or certificate of title, the registrar may, if he think fit, except when a tenancy in common is thereby created or cancelled, instead of cancelling such grant or certificate as provided in the last preceding section, enter in the register book and on the duplicate grant or certificate a memorandum of such transfer, and deliver the duplicate to the transferee; and every grant or certificate with such memorandum shall be as effectual for the purpose of

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evidencing title, and for all other purposes of this Act, as if the old certificate had been cancelled and a new certificate had been issued to the transferee in his own name, and such process in lieu of cancellation may be repeated upon every transfer of the whole of the land.

127. In every transfer of land under the operation of this Act subject to a mortgage or charge, there shall be implied a covenant with the transferor by the transferee, binding the latter and his heirs, executors, administrators and transferees that he or they will pay the interest secured by such mortgage, after the rate and at the times and in the manner therein specified, or will pay the annuity at the times and in the manner specified in the charge, and in the case of land subject to a mortgage will indemnify and keep harmless the transferor and his representatives from and against the principal sum secured by the mortgage, and from and against all liability in respect of any of the covenants therein contained, or by this Act declared to be implied therein, on the part of the transferor.

128. Whenever any transfer or lease of freehold land contains the words "Together with a right of carriage-way over [*specifying or describing the road or roads over which the easement is created, and referring to a map endorsed whereon such road or roads is or are coloured brown*] such words shall have the same effect and be construed as if there had been inserted in such transfer or lease the words "Together with a right of carriage-way over "

129. A memorial of any transfer or lease, creating any easement over or upon or affecting any land under the operation of this Act, shall be entered upon the folium of the register book constituted by the grant or existing certificate of title of such land, in addition to any other entry concerning such instrument required by this Act.

130. A transfer of any land, whether freehold or leasehold, held by registered proprietors being trustees for any society established under The Friendly Societies Statute 1865, or The Friendly Societies Act 1877, or the Friendly Societies Act 1890, or under the Friendly Societies Act 1915, and holding the land as such trustees, signed by the persons for the time being the trustees of the society, shall be as effectual to all intents and purposes as if the same transfer had been signed by the registered proprietors for the time being of the land, notwithstanding anything to the contrary hereof contained in this Act.

Division 2. Leases and sub-leases.

131. The proprietor of any freehold land under the operation of this Act may lease the same for any term exceeding three years by signing a lease thereof in the form in the ninth schedule; but no lease subject to a mortgage or charge shall be valid or binding against the mortgagee or annuitant, unless he has consented in writing to such lease prior to the same being registered.

132. In every lease made under the provisions of this Act there shall be implied the following covenants with the lessor and his transferees, by the lessee, binding the latter and his executors, administrators and transferees (that is to say):—

(i) That he or they will pay the rent reserved by the lease at the times therein mentioned, and all rates and taxes which may be payable in respect of the leased property during

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the continuance of the lease, unless the same are or shall be payable exclusively by the owner of the property under any Act or statute now or hereafter to be in force relating to local government.

(ii) That he or they will keep and yield up the leased property in good and tenantable repair, accidents and damage from storm and tempest, and reasonable wear and tear, excepted.

133. In every lease made under this Act there shall also be implied in the lessor and his transferees the following powers (that is to say):—

(i) That he or they may, with or without surveyors, workmen or others, once in every year during the term, at a reasonable time of the day, enter upon the leased premises and view the state of repair thereof.

(ii) That in case the rent or any part thereof is in arrear for the space of one month, although no legal or formal demand has been made for payment thereof, or in case of any breach or non-observance of any of the covenants expressed in the lease, or by this Act declared to be implied therein, on the part of the lessee or his transferees, and such breach or non-observance continuing for the space of one month, it shall be lawful for the lessor or his transferees to re-enter upon and take possession of the leased property.

134. Whenever in any lease made under this Act the lessee employs any of the forms of words contained in column one of the tenth schedule, and distinguished by any number therein, such lease shall be taken to have the same effect and be construed as if he had inserted therein the form of words contained in column two of the same schedule, and distinguished by the corresponding number; and every such form shall be deemed a covenant with the lessor and his transferees, by the lessee, binding the latter and his executors, administrators and transferees; but it shall not be necessary in any such lease to insert any such number. There may be introduced into or annexed to any of the forms in the first column any express exceptions from or express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

135. In every transfer of lease made under the Real Property Act No. 140, or the Transfer of Land Statute, or the Transfer of Land Act 1890, or this Act, and in every transfer of a grant for years, there shall be implied a covenant with the transferor by the transferee, binding him and his executors, administrators and transferees, that he or they will thenceforth pay the rent by the lease or grant reserved, and perform and observe all the covenants contained in the lease or grant, or by the said Acts or Statute or this Act declared to be implied in the lease, and on the part of the lessee or his transferees to be performed and observed, and will indemnify and keep harmless the transferor and his representatives against all actions, suits, claims, and expenses in respect of the non-payment of such rent, or the breach or non-observance of such covenants or any of them.

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136. The commissioner, upon proof to his satisfaction of recovery of possession by a lessor or his transferees by any legal proceeding, may direct the registrar to make an entry of the same in the register book; and the term for which the land was leased shall upon such entry being made determine, but without prejudice to any action or cause of action which previously has been commenced or has accrued, in respect of any breach or non-observance of any covenant expressed in the lease, or by this Act or by any repealed Act declared to be implied therein.

137. Upon the insolvency of the proprietor of any lease under this Act subject to one mortgage only, or to several mortgages if owned by the same person, the registrar, on the application in writing of the mortgagee or his transferees, accompanied by a statement signed by the assignee of such insolvent refusing to accept such lease, shall enter in the register book a note of such refusal; and such entry shall operate as a foreclosure, and as a transfer of the interest of the insolvent in such lease to the mortgagee or his transferees; and if he or they neglect or refuse to make such application as aforesaid, within twenty-one days after notice in writing in that behalf from the lessor or his transferees has been served on the mortgagee or his transferees, by being given to him or them, or by being sent through the post-office by a registered letter directed to him or them at his or their address as stated in the mortgage or transfer thereof, the registrar, on the application in writing of the lessor or his transferees to be registered as surrenderee or surrenderees of the lease, accompanied by such a statement as aforesaid and proof of such neglect or refusal, shall enter in the register book notice of such statement and of such neglect or refusal; and such entry shall operate as a surrender of such lease discharged from the mortgage, or several mortgages aforesaid, but without prejudice to any action or cause of action which previously has been commenced or has accrued, in respect of any breach or non-observance of any covenant expressed in the lease, or by this Act or by any repealed Act declared to be implied therein.

138. A lease under this Act may be surrendered and determined, as well by operation of law, or under any Act now or hereafter to be in force relating to insolvents and their estates, as by the word "surrendered" with the date being endorsed upon such lease or on the duplicate thereof (if any), and signed by the lessee or his transferee, and by the lessor or his transferee, and attested by a witness. The registrar shall enter in the register book a memorandum recording the date of such surrender, and shall likewise endorse upon the duplicate (if any) a memorandum recording the fact of such entry having been made. Upon such entry in the register book the estate and interest of the lessee or his transferee shall vest in the lessor, or in the proprietor for the time being of the reversion and inheritance in the land immediately expectant on the term; and production of such lease or duplicate (if any) bearing such endorsement and memorandum shall be sufficient evidence that such lease has been legally surrendered: provided that no lease subject to a mortgage or charge shall be so surrendered without the consent in writing of the proprietor thereof.

139. The proprietor of any lease under this Act may, subject to any provisions in his lease affecting his right so to do, sub-let for a term not less than three years by signing a sub-lease in the form in the eleventh schedule; but no sub-lease of any land subject to a mortgage

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or charge upon the lease of the land comprised in the sub-lease shall be valid or binding against the mortgagee or annuitant of the lease, unless he has consented in writing to such sub-lease previously to the same being registered.

140. A sub-lease shall be deemed and taken to be registered when a memorial thereof as described in section 58 has been endorsed on the original lease in the register book, and the person named in any registered sub-lease as the sub-lessee shall be deemed and taken to be the proprietor thereof. The registrar shall endorse on the sub-lease a certificate of the time at which the memorial was endorsed on the original lease, and shall authenticate such certificate by signing his name thereto; and such certificate shall be received in all courts as conclusive evidence that such sub-lease has been duly registered.

141. Notwithstanding the provisions of section 53 a sub-lease shall not be bound up in the register book, but upon registration one original shall be lodged and retained in the office of titles; and a book to be called the "sub-lease register" shall be kept in the office, wherein entry shall be made of the date, parties, term, and distinguishing memorial number or symbol of such sub-lease, and such book shall be open to inspection by the public during the hours and days of business, on payment of the fee provided in that behalf.

142. The provisions of this Act affecting leases, lessors, and lessees shall apply to sub-leases, sub-lessors, and sub-lessees, with such modifications and exceptions as the difference between a lease and sub-lease, and in the mode of registration thereof, requires; and the entries of recovery of possession and of surrender, provided for by sections 136 and 138 shall in the case of a sub-lease be made on the sub-lease and on the lease, and not in the register book; and the memorandum directed by section 138 to be endorsed on the duplicate shall be written across the entry of such sub-lease in the sub-lease register; and in case of a surrender evidenced by a separate document, such document shall be annexed to the original sub-lease.

If the lease is determined by forfeiture, or operation of law, or by surrender under any Act relating to insolvents and their estates, such determination or surrender shall determine the sub-lease.

143. In addition to the covenants specified in section 132 to be implied in every lease, there shall be implied in every sub-lease the following covenant with the sub-lessee and his transferees, by the sub-lessor, binding the latter and his executors, administrators and transferees (that is to say):—

> That he or they will during the term thereby granted pay the rent reserved by, and perform and observe the covenants and agreements contained in, the original lease, and on his or their parts to be paid, performed and observed.

144. In the case of a lease or sub-lease of land under this Act, if it is proved to the satisfaction of the commissioner that the lessor or sub-lessor, or his transferee, has re-entered upon the premises in strict conformity with the provisions for re-entry contained in the lease or sub-lease, or under the power of the second sub-section of section 133 where the lease or sub-lease is under this Act, or that the lessee or sub-lessee has abandoned the leased premises and the lease, and that the lessor or sub-lessor or his transferee has thereupon re-entered upon and occupied the said premises by himself or tenants undisturbed by the

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lessee or sub-lessee, the commissioner may direct the registrar to make an entry of such re-entry in the register book, or in the sub-lease register (as the case may be), and the term for which the land was leased or sub-leased shall upon such entry being made determine, and may be removed as an incumbrance from a certificate, but without prejudice to any action or cause of action which previously has been commenced or has accrued, in respect of any breach or non-observance of any covenant expressed in the lease or sub-lease, or by this Act, or by any repealed Act, declared to be implied therein.

Conv. Act 1915, s. 14. The provisions of [Part III. of the Conveyancing Act 1915 (ss. 14-26), "Leases"] shall apply to leases and subleases under the Transfer of Land Act 1915, notwithstanding anything in that Act contained.

Division 3. Mortgages and Annuities.

145. The proprietor of any land under the operation of this Act may mortgage the same by signing a mortgage thereof in the form in the twelfth schedule, and may charge the same with the payment of an annuity by signing a charge thereof in the form in the thirteenth schedule.

146. A mortgage or a charge under this Act shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged or charged; and in case default is made in payment of the principal sum, interest, or annuity secured, or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage or charge, or hereby declared to be implied in any mortgage, and such default is continued for one month, or for such other period of time as is therein for that purpose expressly fixed, the mortgagee or annuitant, or his transferees, may serve on the mortgagor or grantor, or his transferees, notice in writing to pay the money owing on such mortgage or charge, or to perform and observe the aforesaid covenants (as the case may be), by giving such notice to him or them, or by leaving the same on the mortgaged or charged land, or by sending the same through the post office by a registered letter, directed to the then proprietor of the land at his address appearing in the register book.

147. Where money secured by a mortgage under this Act is made payable on demand, a demand in writing pursuant to the mortgage shall be equivalent to the notice in writing to pay the money owing provided for by the last preceding section of this Act; and no other notice shall be required, to create the default in payment mentioned in the next succeeding section.

148 [Am. 1916, s. 9]. If such default in payment or in performance or observance of covenants continues for one month after the service of such notice or for such other period as in such mortgage or charge is for that purpose fixed, the mortgagee or annuitant or his transferees may sell or concur with any other person in selling the mortgaged or charged land, or any part thereof, either subject to prior mortgages or charges or not, and either together or in lots, by public auction or by private contract, and either at one or several times, subject to such terms and conditions as the mortgagee or annuitant thinks fit, with power to vary any contract for sale, and to buy in at any auction, or

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to vary or rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages, and grant such easements of right of way or drainage over the same, as the circumstances of the case require and the mortgagee or annuitant thinks fit; and may make and sign such transfers, and do such acts and things as are necessary for effectuating any such sale; and no purchaser shall be bound to see or inquire whether such default as aforesaid has been made or has happened, or has continued, or whether such notice as aforesaid has been served, or otherwise into the propriety or regularity of any such sale. Where a transfer is made in professed exercise of the power of sale conferred by this Act, the title of the transferee shall not be impeachable on the ground that no cause had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power. An instrument of transfer by a mortgagee or annuitant in exercise of the power of sale conferred by this Act, made in the form prescribed in the seventh schedule to this Act, may be accepted by the registrar as sufficient evidence that the power has been duly exercised and he shall not be bound or required to call for proof thereof.

149. The purchase money arising from the sale of the mortgaged or charged land shall be applied as follows:—

If the sale is by the mortgagee or his transferees—

First, in payment of the expenses of and incidental to such sale, and consequent on such default: secondly, in payment of the moneys which are due or owing on the mortgage: thirdly, in payment of subsequent mortgages, and of any moneys which are due or owing in respect of any subsequent charges, in the order of their respective priorities: and the surplus (if any) shall be paid to the mortgagor: provided always that if the sale is made by a mortgagee or his transferees, and there is a subsequent charge, the purchase moneys, after there have been made thereout all proper prior payments, shall be deposited by him or them in the manner and names and for purposes corresponding with those after mentioned.

If the sale be by the annuitant or his transferees—

First, in payment of the expenses of and incidental to such sale, and consequent on such default; then in payment of the moneys which are due or owing to the annuitant or his transferees; and the residue shall be deposited by him or them at interest in the State Savings Bank, or in some other bank in Melbourne, in the joint names of the annuitant or his transferees and of the registrar, to satisfy the accruing payments of the charge, and subject thereto for the benefit of the parties who are or become entitled to the residue of the deposited money.

150. Upon the registration of any transfer signed by a mortgagee or annuitant, or his transferees, for the purpose of such sale as aforesaid, the estate and interest of the mortgagor or grantor in the land therein described at the time of the registration of the mortgage or

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charge, or which he was then entitled or able to transfer or dispose of under any power of appointment or disposition, or under any power herein contained, shall pass to and vest in the purchaser, freed and discharged from all liability on account of such mortgage or charge, and of any mortgage, charge, or incumbrance registered subsequent thereto, excepting a lease or grant of easement to which lease or grant the mortgagee or annuitant, or his transferees, has consented in writing; and the purchaser, when registered as the proprietor, shall be deemed a transferee of such land, and shall be entitled to receive a certificate of title to the same.

151. The mortgagee or annuitant, or his transferees, upon default in payment of the principal sum or interest or annuity, or any part thereof respectively, at the time mentioned in the mortgage or charge, may enter into possession of the mortgaged or charged land by receiving the rents and profits thereof, and may distrain upon the occupier or tenant of the land under the power to distrain hereinafter contained, or may bring an action of ejectment to recover the land, either before or after entering into the receipt of the rents and profits thereof or making any distress, and either before or after any sale of such land is effected under the power of sale aforesaid, in the same manner in which he or they might have brought such action if the mortgage money or annuity had been secured to him or them by an assurance of the legal estate in the land mortgaged or charged; and any mortgagee or his transferees shall be entitled to foreclose the rigbt of the mortgagor or his transferees to redeem the mortgaged land in manner hereinafter provided.

152. Besides his other remedies every first mortgagee or annuitant for the time being, and every transferee of a first mortgage or charge for the time being, shall be entitled, as often as it happens that the interest or annuity, or any part thereof respectively, is in arrear for twenty-one days, and after seven days have elapsed from an application to the occupier or tenant for the payment thereof, to enter upon the mortgaged or charged land and distrain the goods and chattels of such occupier or tenant for the arrears of the said interest or annuity, and the distress and distresses then and there found to dispose of in like manner as landlords may do in respect of distresses for rent reserved upon common demises, and out of the sale moneys to retain the moneys which are so in arrear, and all costs and expenses occasioned by such distress and sale: provided that no occupier or tenant shall be liable to pay to any such mortgagee or annuitant or transferee a greater sum than the amount of rent which at the time of making such application for payment is due from such occupier or tenant; and any amount so paid, as well as any amount which is paid by him to any such mortgagee or annuitant or transferee during the time he may be in the receipt of the rents and profits, shall be held to be pro tanto satisfaction of the rent.

Conv. Act 1915, s. 35. (1) A mortgagee, where the mortgage . . is under the Transfer of Land Act 1915, shall by virtue of this Act have a power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof.

153. In every mortgage made under the provisions of this Act there shall be implied covenants with the mortgagee and his trans-

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ferees, by the mortgagor, binding the latter and his heirs, executors, administrators and transferees, that he or they will pay the principal money therein mentioned on the day therein appointed, and will so long as the principal money or any part thereof remains unpaid pay interest thereon, or on so much thereof as for the time being remains unpaid, at the rate and on the days and in manner therein specified; also that he or they will repair, and keep in repair all buildings or other improvements which have been or are erected or made upon the mortgaged land; and that the mortgagee and his transferees may, at all reasonable times until such mortgage is redeemed, enter into and upon such land, with or without surveyors or others, to view and inspect the state of repair of such buildings or improvements.

154. A mortgagee of or annuitant upon land leased under this Act, and his transferees, after entering into possession of the land or the receipt of the rents and profits thereof shall, during such possession or receipt, and to the extent of any benefit, rents, and profits which are received, become and be subject and liable to the lessor of the said land, or his transferees, or the person for the time being entitled to the reversion and inheritance expectant on the term of the lease, for the payment of the rent reserved by the lease, and for the performance and observance of the covenants therein contained, or by this Act or by any repealed Act declared to be implied therein, on the part of the lessee or his transferees.

155. Whenever in any mortgage made under this Act the mortgagor employs the form of words contained in column one of the fourteenth schedule, such mortgage shall be taken to have the same effect and be construed as if he had inserted therein the form of words contained in column two of the same schedule; and every such form shall be deemed a covenant with the mortgagee and his transferees, by the mortgagor, binding the latter and his heirs, executors, administrators and transferees. There may be introduced into or annexed to the form in the first column any express exception from, or express qualification thereof; and the like exception or qualification shall be taken to be made from or in the form in the second column.

156. In addition to and concurrently with the rights and powers conferred on a first mortgagee, and on a transferee of a first mortgage, by this Act, every present and future first mortgagee for the time being of land under this Act, and every transferee of a first mortgage for the time being upon any such land, shall, until a discharge from the whole of the money secured, or until a transfer upon a sale or an order for foreclosure (as the case may be) has been registered, have the same rights and remedies at law and in equity (including proceedings before justices of the peace) as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him, with a right in the mortgagor of quiet enjoyment of the mortgaged land until a default in payment of the principal and interest money secured, or some part thereof respectively, or until a breach in the performance or observance of some covenant expressed in the mortgage, or by the provisions of this Act, or of any repealed Act, to be implied therein. Nothing contained in this section shall affect or prejudice the rights or liabilities of any such mortgagee or transferee after

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an order for foreclosure has been entered in the register book; or shall, until the entry of such an order, render a first mortgagee of land leased under this Act, or the transferee of his mortgage, liable to or for the payment of the rent reserved by the lease, or for the performance or observance of the covenants expressed or to be implied therein.

157. A mortgagor or his transferee shall not, either before or after such default or breach as aforesaid, commence in his own name any action at law for or in respect of any cause of action for which a first mortgagee, or his transferee, may sue under the last preceding section, without obtaining the previous consent in writing of such mortgagee or transferee, or his agent, to the commencement of such action, after giving which consent such mortgagee or transferee shall not be entitled to bring in his name any action at law in respect of the cause of action specified in such consent: provided however that if a mortgagor or his transferee brings any such action in his own name, and the defendant proves the existence of a mortgage, the plaintiff shall not be nonsuited, nor shall there be a verdict against him, if he proves in reply that the action was brought with the written consent of the mortgagee, or of the transferee of his mortgage, or his agent.

158. Any sum of money which becomes payable to the mortgagor or his transferee, under any decree or order in any action by him in the Supreme Court for or on account of any waste or damage of or to the land mortgaged, shall be paid to the first mortgagee or his transferee in reduction or satisfaction of the money secured; and if he is not willing to receive the same, or thereby is fully paid off, the same or the balance shall be paid to any subsequent mortgagee or his transferee, according to priority, in like reduction or satisfaction; and if no mortgagee or his transferee is willing or is entitled to receive the same, then to the mortgagor or his transferee for his own benefit.

159. Any mortgagee or his transferee may, either before or after judgment or execution obtained in any action at law brought by the mortgagor or his transferee, apply to a judge for a summons in such action, calling on the plaintiff and defendant or their solicitors or agents to attend before a judge and show cause why any sum beyond twenty-five pounds, which has been or is recovered for damages in such action, or which becomes payable on the settlement thereof, should not be paid to such persons and for such purposes as are hereinbefore mentioned, with respect to money payable under any decree or order in any suit in equity by the mortgagor or his transferee; and the judge hearing the summons shall determine the matter thereof in a summary manner, and shall make such order therein as to costs and all other matters as appears to be just and reasonable; and the decision of such judge shall be final and conclusive against all parties: provided always that every order made in pursuance of this section shall be liable to be rescinded or altered by the full Court in like manner as other orders made by a single judge. The sheriff or other officer who has the execution of any writ of fieri facias issued in such action shall on being served with a copy of such order obey the same.

160. Any money received by a first mortgagee or his transferee, under any proceeding commenced in his name at law or in equity, shall after payment thereout of his costs be applied in reduction or satisfaction of the moneys secured, and subject thereto shall be disposed of according to the equities of the parties interested.

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161. Whenever default has been made in payment of the principal or interest moneys secured by a mortgage, and such default is continued for six months after the time for payment mentioned in the mortgage, the mortgagee or his transferee may make application in writing to the commissioner for an order for foreclosure; and such application shall state that such default has been made, and has continued for the period aforesaid, and that the land mortgaged has been offered for sale at public auction by a licensed auctioneer, after notice of sale served as hereinbefore provided, and that the amount of the highest bidding at such sale was not sufficient to satisfy the moneys secured by such mortgage, together with the expenses occasioned by such sale, and that notice in writing of the intention of the mortgagee or his transferee to make application for foreclosure had been served on the mortgagor, or his transferees, by being given to him or them, or by being left on the mortgaged land, or by the same being sent through the post office by a registered letter, directed to him or them at his or their address appearing in the register book, and also that a like notice of such intention has been served on every person appearing by the register book to have any right, estate, or interest to or in the mortgaged land subsequently to such mortgage, by being given to him, or sent through the post office by a registered letter, directed to him at his address appearing in the register book. Such application shall be accompanied by a certificate of the auctioneer by whom such land was put up for sale, and such other proof of the matters stated by the applicant as the commissioner may require; and the statements made in such application shall be verified by statutory declaration.

162. Upon such application the commissioner may direct the registrar to cause notice to be published once in each of three successive weeks in at least one newspaper published in the city of Melbourne offering such land for private sale, and shall appoint a time not less than one month from the date of the first of such advertisements, upon or after which the registrar shall issue to such applicant an order for foreclosure, unless in the interval a sufficient amount has been obtained by the sale of such land to satisfy the principal and interest moneys secured, and all expenses occasioned by such sale and proceedings; and every such order for foreclosure under the hand of the registrar, when entered in the register book, shall have the effect of vesting in the mortgagee or his transferee the land mentioned in such order, free from all right and equity of redemption on the part of the mortgagor, or of any person claiming through or under him subsequently to the mortgage; and such mortgagee or his transferee shall upon such entry being made, be deemed a transferee of the mortgaged land, and become the proprietor thereof, and be entitled to receive a certificate of title to the same.

Conv. Act 1915, s. 32. (1) On a decree, judgment, or order absolute for foreclosure, the mortgagee shall be deemed to have taken the property mentioned in such decree, judgment, or order in full satisfaction of the mortgage debt, and his right or equity to bring any action, or take other proceedings for the recovery of the mortgage money from the debtor, surety, or other person shall be extinguished, and the right or equity of the mortgagor to redeem the said property shall also be extinguished.

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(2) In the case of mortgages of land under the Transfer of Land Act 1915, "order absolute" includes an order for foreclosure under the hand of the registrar, when entered in the register book.

(3) Nothing in this section shall be deemed to disentitle the mortgagee to obtain foreclosure of any other property over which he holds security by way of mortgage for the said money or part thereof, or to enforce all or any rights, powers, and remedies expressed or implied in such mortgage, except the right to sue the mortgagor, or any surety for the mortgagor, either for the mortgage money or on any bill or note given as security for the mortgage money, as if this section had not been made law.

. . .

(5) This section shall have effect notwithstanding any stipulation to the contrary.

163. Upon production of a memorandum signed by the mortgagee or annuitant, or his transferees, and attested by a witness, discharging the land from the whole or part of the moneys or annuity secured, or discharging any part of the land from the whole of such moneys or annuity, the registrar shall make an entry upon the original grant or certificate, and upon the original mortgage or charge and upon the duplicate thereof (if any), stating the time at which it was made, that such mortgage or charge is discharged wholly or partially, or that part of the land is discharged as aforesaid (as the case may be); and upon such entry being made the land, or the portion of land described in such memorandum, shall cease to be subject to or liable for such moneys or annuity, or for the part thereof mentioned in such entry as discharged; and the registrar shall make a corresponding entry on the duplicate grant or certificate of title when produced to him for that purpose.

164. Upon proof to the satisfaction of the commissioner of the death of the annuitant or of the occurrence of the event or circumstance upon which in accordance with the provisions of any charge the annuity thereby secured ceases to be payable, and upon proof to the like satisfaction that all arrears of the annuity and all costs occasioned by non-payment thereof have been paid or satisfied, he shall direct the registrar to make an entry in the register book that such annuity is satisfied; and upon such entry being made the land shall cease to be subject to or liable for such annuity; and the registrar shall make the like entry on the duplicate as is mentioned in the last preceding section.

165. In case a mortgagee or his transferee is absent from Victoria, and there is no person authorized to give a receipt for the mortgage money at or after the date appointed for payment thereof, it shall be lawful for the treasurer of Victoria to receive such mortgage money, with all arrears of interest due thereon, in trust for the mortgagee or other person entitled thereto; and thereupon the interest upon such mortgage shall cease to run or accrue; and the registrar shall, upon production of the receipt of the treasurer for the amount of the mortgage money and interest, make an entry in the registry book discharging the land from such mortgage, stating the time at which such entry was made; and such entry shall be a valid discharge from such mortgage; and the registrar shall make a corresponding entry on the duplicate grant or certificate of title when produced to him for that purpose. The treasurer shall from time to time invest all mortgage

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moneys and interest which are received by him under this section, together with all dividends and interest which accrue thereon, in Victorian government securities for the benefit of the persons who are for the time being entitled thereto; but nothing herein contained shall render any treasurer in any manner liable for not investing the same respectively. The registrar shall address to the treasurer requisitions, countersigned by the commissioner, to pay to such persons the moneys to which they are entitled hereunder; and such moneys shall be issued in like manner as moneys are issued from the trust fund.

166. When any instrument subsequent to a first mortgage is made by the proprietor of any land, and such proprietor, or the person entitled to the benefit of such subsequent instrument, desires the registration of such subsequent instrument, the first mortgagee, if he holds the duplicate grant or certificate of title which comprises the land in such subsequent instrument, shall upon being requested so to do by the proprietor of the land, or the person entitled to the benefit of such subsequent instrument, but at the cost of the person making such request, produce such duplicate grant or certificate of title to the registrar, so that such subsequent instrument may be registered.

167. When any land has been brought under this Act subject to any mortgage, and the mortgagee, or any person claiming under him, applies for a certificate of title to the land foreclosed or purchased, the mortgage shall be deemed to have conferred upon the mortgagee, or the purchaser under the power of sale contained in the mortgage, the right to be registered as proprietor at law as well as in equity of the same estate in the land as that for which the mortgagor was registered, and the only enquiry into title shall be as to the validity of the foreclosure or sale and of any subsequent transfers or transmissions of title to the applicant, and no caveat, which might have been or which was lodged against the original application, shall be lodged or renewed in respect of the same estate or interest against the application of the mortgagee or any person claiming under him.

168. Where land has been brought under this Act subject to an outstanding legal mortgage under the general law, shown as an incumbrance on the certificate of title which brought the land under the Act, if default has been made in payment of the principal or interest moneys secured by such mortgage, and such default has continued for six months after the time for payment mentioned in such mortgage, it shall be lawful for the mortgagee, where there is but one such mortgage, or for the first mortgagee, if more than one such mortgagee, his executors, administrators and assigns, or other the person who would be entitled to bring an action for foreclosure under the general law, to make application in writing to the commissioner for an order for foreclosure (which order he is hereby empowered to make concurrently with the Supreme Court), provided that the right to foreclosure has not theretofore been determined in any contested proceeding in any court of competent jurisdiction in which such right to foreclosure was in question, and the only enquiry into title shall be as to whether the applicant's estate and interest under or in respect of the said mortgage are such as would have entitled him, had he elected so to do, to bring an action for foreclosure under the general law by reason of such default as aforesaid; and unless the commissioner so directs such enquiry shall not be extended to time or events

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prior to the date of the certificate of title which brought the land under the Act, and on which such mortgage was first shown as an incumbrance.

169. Such application shall state that such default has been made after due notice to pay, given and served in manner provided by the said mortgage, and has continued for the aforesaid period of six months; that the land comprised in and remaining subject to the mortgage has been offered for sale at public auction by a licensed auctioneer, after notice of intention to sell given and served in manner provided by the mortgage; that the amount of the highest bidding at such attempted sale was not sufficient to satisfy the moneys secured by such mortgage, together with the expenses occasioned by such attempted sale; and that after such attempted sale notice in writing of the intention of the applicant to make such application for foreclosure had been served on the mortgagor, or his transferees, and on every other person appearing by the register book of the registrar of titles, and on every person appearing by the register book of the registrar-general respectively, to have any right, estate, or interest to or in the mortgaged land, or in the mortgage security registered in such register books respectively, subsequent to the date of the certificate of title by which such land was brought under the Act; and that such notice has been served, by being given to such person, or sent through the post office by registered letter, directed to him at his address appearing in the register book of the registrar of titles or the register book of the registrar-general (as the case may be); such application shall be accompanied by a certificate of the auctioneer by whom such land was put up for sale; and the statements made in such application shall be verified by statutory declaration. If the applicant's title is a derivative title, the applicant must state shortly in a schedule to the application the assignments, devolutions, or transmissions under which he claims; and if the applicant has entered into possession under the mortgage, the application shall state that fact and the date of such entry.

170. The registrar shall refer any application made as aforesaid to an examiner, who shall report thereon to the commissioner, who in dealing with such application may make such requisitions as to title or otherwise as he thinks fit, and may in his discretion grant such application altogether or in part; or may, notwithstanding any direction previously given by him as to such application, reject the same altogether or in part, if the applicant fails to comply with any such requisition to the satisfaction of the commissioner within such time as to the commissioner seems reasonable.

171. Upon such application the commissioner may direct the registrar to cause notice to be published once in each of three successive weeks, with an interval of not less than five days between each publication, in at least one newspaper published in the city of Melbourne, offering such land for private sale; and shall appoint a time not less than one month from the date of the first of such advertisements, upon or after which the registrar shall issue to such applicant an order for foreclosure, unless in the interval a sufficient amount has been obtained by the sale of such land to satisfy the principal and interest moneys secured, and all expenses occasioned by such sale and proceedings; and every such order for foreclosure under the hand of the registrar, when entered in the register book, shall have the effect

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of vesting in the applicant or his executors, administrators or assigns, the land mentioned in such order free from all right and equity of redemption on the part of the mortgagor, or of any person claiming through or under him subsequently to the mortgage; and such applicant, executor, administrator, or assign shall, upon such entry being made, be deemed a transferee of the mortgaged land and become the proprietor thereof, and be entitled to receive a certificate of title to the same.

172. Any person claiming any estate or interest in the land, or in or under the mortgage security, in respect of which any such application is made as hereinbefore provided, may before the granting thereof lodge a caveat with the registrar forbidding the granting of the application; and every such caveat shall in all other respects be in the same form, shall be subject to the same provisions, and shall have the same effect with respect to the application against which it is lodged, as an ordinary caveat against bringing land under the operation of this Act.

173. Upon granting such application, the commissioner may grant the same conditioned upon the applicant contributing to the assurance fund such a sum of money as the commissioner certifies under his hand to be in his judgment a sufficient indemnity, by reason of the imperfect nature of the evidence of title adduced in support of the application; or as against any uncertain or doubtful claim or demand incident to, or which may arise upon, the title of the applicant; or any risk to which the assurance fund may be exposed by the granting of the application; and the applicant shall be chargeable with such fees in respect of such application and order as are made chargeable under this Act.

174. Neither the right to make, nor the making of, such application shall deprive the applicant of the right to bring an action for foreclosure under the general law, but he shall not be at liberty to pursue his remedy by such application and his remedy by action for foreclosure concurrently.

Division 4. Miscellaneous.

175. A corporation, for the purpose of transferring or otherwise dealing with any land under the operation of this Act, or any lease, mortgage or charge, may, in lieu of signing the instrument for such purpose required, affix thereto its common seal. The seal of the attorney of any corporation whose chief or head office of business is out of Victoria, whether such attorney has been already constituted, or hereafter is constituted, by a power of attorney under a seal purporting to be the common seal of the corporation giving the power, shall be deemed to be the common seal of such corporation within the meaning and for the purposes of this section.

176. Every covenant and power to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument, or endorsed thereon; and in the declaration in any action for a breach of any such covenant it shall be lawful to allege that the party against whom, or against whose real or personal representatives, such action is brought did so covenant, precisely in the same manner as if such covenant had been expressed in words at length in such instrument, any law or practice to the contrary notwithstand-

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ing; and every such implied covenant shall have the same force and effect as if it had been set out at length in such instrument, and where in any instrument there shall be more covenantors than one, such covenants as are by this Act declared to be implied in instruments of the like nature shall be construed to be several, and not to bind the parties jointly.

177 [Am. 1916, s. 10]. Upon the receipt of the probate of any will, or of any letters of administration, or of a rule to administer granted to the curator, or of any rule or order whereby it appears that any person has been appointed or constituted the executor or administrator of any deceased person, or upon the receipt of an office copy of any such probate, letters of administration, rule to administer, rule or order, and upon the notification in the Government Gazette of the appointment of any succeeding curator, the registrar shall, on an application in writing of the executor, administrator, or curator (as the case may be) to be registered as proprietor in respect of any leasehold land (therein described) brought under the operation of this Act, or of any lease, mortgage, or charge therein described, enter in the register book, and on the duplicate instrument (if any) when produced for any purpose, a memorandum notifying the appointment of such executor, administrator or curator, and the day of the death of the proprietor when the same can be ascertained, and upon such entry being made such executor, administrator, or curator shall become the transferee and be deemed to be the proprietor of such land, lease, mortgage or charge, or of such part thereof as then remains unadministered, and shall hold the same subject to the equities upon which the deceased held the same, but for the purpose of any dealings therewith under the provisions of this Act such executor, administrator, or curator shall be deemed to be the absolute proprietor thereof. The title of every executor, administrator, or curator becoming a transferee under this section shall, upon such entry being made, relate back to and be deemed to have arisen upon the death of the proprietor of any land, lease, mortgage or charge, as if there had been no interval of time between such death and entry. If in any case probate or administration is granted to more persons than one, all of them for the time being shall join and concur in every instrument, surrender, or discharge relating to the land, lease, mortgage or charge. No contribution to the assurance fund under this Act shall be payable on the registration of such executor, administrator or curator.

178 [Am. 1916, s. 11]. No execution registered prior to or after the commencement of this Act shall bind, charge, or affect any land, or any lease, mortgage or charge; but the registrar, on being served with a copy of any writ of fieri facias issued out of the Supreme Court, or of any decree or order of the Supreme Court or of a county court in its equitable jurisdiction, accompanied by a statement signed by any party interested, or his attorney, solicitor or agent, specifying the land, lease, mortgage, or charge sought to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the register book; and after any land, lease, mortgage, or charge so specified has been sold under any such writ, decree or order, the registrar shall, on receiving a transfer thereof in such one of the forms in the fifteenth schedule as the case requires (which transfer shall have the same effect as if made by the proprietor), enter such transfer in the register book;

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and on such entry being made, the purchaser shall become the transferee and be deemed the proprietor of such land, lease, mortgage or charge: provided that until such service as aforesaid no sale or transfer under any such writ shall be valid as against a purchaser for valuable consideration, notwithstanding such writ was actually lodged for execution at the time of the purchase, and notwithstanding the purchaser had actual or constructive notice of the lodgment of such writ. Upon production to the commissioner of sufficient evidence of the satisfaction of any writ, a copy whereof has been served as aforesaid, he shall direct an entry to be made in the registry book of a memorandum to that effect; and on such entry such writ shall be deemed to be satisfied. Every such writ shall cease to bind, charge, or affect any land, lease, mortgage, or charge specified as aforesaid, unless a transfer upon a sale under such writ is lodged for entry upon the register within three months from the day on which the copy was served. On a transfer from the sheriff being presented for registration, it shall not be registered, nor deemed produced for registration within the meaning of section 53, unless previously and within three months preceding the transfer being so presented a copy of the writ of fi. fa. in pursuance of which such transfer purports to have been made has been duly served upon the registrar, for entry by him in the register book in accordance with the provisions of this section. [This section] shall extend and apply to writs of fieri facias issued out of the High Court of Australia, and to judgments and orders of that court, and to officers thereof; and the several forms of transfer prescribed by [this] section, and contained in the fifteenth schedule to [this] Act, may be modified or amended accordingly.

179. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer from, the proprietor of any registered land, lease, mortgage or charge shall be required or in any manner concerned to enquire or ascertain the circumstances under or the consideration for which such proprietor, or any previous proprietor thereof, was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

180. A transfer or mortgage in the ordinary form by a tenant in tail under this Act, having power to create an estate in fee simple, shall create such estate in favour of a transferee, mortgagee, or transferee under the power of sale in the mortgage, and a transferee from a tenant in tail, or under a mortgage from a tenant in tail or a mortgagee after foreclosure, shall be entitled to be registered and receive a certificate for the larger estate which the tenant in tail is empowered to confer, but a mortgage under this Act if discharged shall not bar the entail.

181. Nothing contained in this Act shall enable any lessee of land under any grant to transfer or otherwise deal with such land contrary to the provisions of The Amending Land Act 1865, or any subsequent Land Act affecting such grant.

[182: V. 1890, s. 143, Aust. Torr. Syst. 542.]

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PART VII. CAVEATS.

183. Any beneficiary, or other person claiming any estate or interest in land under the operation of this Act, or in any lease, mortgage, or charge under any unregistered instrument, or by devolution in law, or otherwise, may lodge a caveat with the registrar in the form in the sixteenth schedule, or as near thereto as circumstances permit, forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest, either absolutely, or until after notice of the intended registration or dealing is given to the caveator, or unless such instrument is expressed to be subject to the claim of the caveator, as is required in such caveat, or unless the caveator consents in writing thereto. Every such caveat shall state the name and addition of the person by whom, or on whose behalf, the same is lodged, and (except in case of a caveat lodged by order of the Supreme Court or by the registrar pursuant to the direction of the commissioner as hereinafter provided) shall be signed by the caveator, or by his agent. The person lodging such caveat shall, if required, support the same by a statutory declaration, stating the nature of the title under which the claim is made, and may withdraw any such caveat. No such caveat shall be received unless some address or place within the present limits of the city of Melbourne is appointed therein, as the place at which notices and proceedings relating to such caveat may be served. A caveator may however give an additional address out of the said city at the foot of such caveat, in which case a registered letter shall be sent through the post office to such address, on the same day as that on which any notice relating to such caveat is served in Melbourne. Every notice relating to such caveat, and any proceedings in respect thereof, if served at the address or place appointed as aforesaid, shall be deemed to be duly served.

184 [Am. 1916, s. 12]. Upon the receipt of such caveat the registrar shall notify the same to the person against whose application to be registered as proprietor or (as the case may be) to the proprietor against whose title to deal with the estate or interest such caveat has been lodged; and such applicant or proprietor, or any person claiming under any transfer or other instrument signed by the proprietor, may if he thinks fit summon the caveator to attend before the full Court of the Supreme Court, to show cause why such caveat should not be removed; and such court may, upon proof that such caveator has been summoned, make such order in the premises, either ex parte or otherwise and as to costs, as to such court seems fit. In cases of urgency such summons may be made returnable before a judge of the Supreme Court in chambers, and if such judge considers that the summons should be immediately or promptly heard he may, subject to appeal to the full Court, hear and determine the same and exercise the powers hereinbefore conferred on the full Court, or he may without any application by either party refer such summons to the full Court, and may in any case make such order as to costs as he thinks fit. Except in the case of a caveat lodged by or on behalf of a beneficiary claiming under any will or settlement, or by the registrar pursuant to the direction of the commissioner, every caveat lodged against a proprietor shall be deemed to have lapsed as to the land affected by the transfer or other dealing, or registration abstract, immediately hereinafter referred to,

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upon the expiration of fourteen days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing, or the issue of a registration abstract, unless in the meantime such application has been withdrawn. A caveat shall not be renewed by or on behalf of the same person, in respect of the same estate or interest; but if before the expiration of the said period of fourteen days, or such further period as is specified in any order made under this section, the caveator or his agent appears before a judge, and gives such undertaking or security, or lodges such sum in court, as such judge considers sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, then and in such case such judge may direct the registrar to delay registering any dealing with the land, lease, mortgage, or charge, or issuing a registration abstract, for a further period to be specified in such order, or may make such other order, and in either case such order as to costs, as is just.

185 [Am. 1916, s. 13]. So long as any caveat remains in force prohibiting any registration or dealing, the registrar shall not, except in accordance with some provision of such caveat, or with the consent in writing of the caveator, enter in the register book any change in the proprietorship of, or any transfer or other instrument purporting to transfer or otherwise deal with or affect, the estate or interest in respect to which such caveat is lodged, or issue any registration abstract.

186. Any person lodging any caveat with the registrar, either against bringing land under this Act or otherwise, without reasonable cause, shall be liable to make to any person who may have sustained damage thereby such compensation as a judge on a summons in chambers deems just and orders.

187. A memorandum of every caveat lodged under the provisions of section 183 shall be endorsed on the grant or the certificate of the land, or on the instrument to which it relates, and a copy of the caveat, or of so much thereof as the registrar deems material to the person notified, shall be sent with the notification required by section 184.

188. Where a caveat has been lodged by or on behalf of a beneficiary claiming under a will or settlement, and a change in the proprietorship of, or a transfer or other dealing with or affecting, the land, estate, or interest in respect of which the caveat was lodged is presented for registration, the same may notwithstanding section 185 be registered without the caveat being withdrawn, and without determining the operation of the caveat, provided the commissioner is of opinion that such change of proprietorship, or such transfer or other dealing, is authorized by the will or settlement, and the caveator either consents to the registration, or does not lodge a written protest against such registration within fourteen days after being served with notice as such caveator.

PART VIII. POWERS OF ATTORNEY AND ATTESTATION OF INSTRUMENTS.

189. The proprietor of any land under the operation of this Act, or of any lease, mortgage, or charge may appoint any person to act for him in transferring the same, or otherwise dealing therewith, by signing a power of attorney in the form in the seventeenth schedule. Every such power shall be filed in accordance with

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the provisions of Part XI. of the Instruments Act 1915, and if so filed within four months after the date thereof shall be deemed to be in force at the time of the filing thereof, unless a revocation thereof has been previously registered under the said Act; but this shall not diminish the force and effect of any such power if filed afterwards. Any such power may be revoked in the cases and manner specified in such Act; and after the registration of any revocation of the power the registrar shall not give effect to any transfer or other instrument signed pursuant to the power, unless signed under any then outstanding registration abstract.

190. A power of attorney given by a person before as well as after becoming a proprietor of any land, or of any lease, mortgage or charge, shall be deemed to be within the meaning of the last preceding section; and every power of attorney heretofore given or which hereafter is given, when filed shall, while continuing in force, be valid and available, within the scope and to the extent of the powers and authorities given or to be given by such power, concerning the lands, tenements, and chattels real generally of the principal for similar or corresponding dealings under this Act with any land under the operation hereof, or with any lease, mortgage or charge.

191. Instruments and powers of attorney under this Act signed by any person, and attested by one witness, shall be held to be duly executed, and such witness may be—

Within the limits of Victoria—

The registrar, or an assistant registrar, or a justice of the peace, notary public, barrister, solicitor of the Supreme Court, or clerk to a solicitor of the Supreme Court, registrar of county court, clerk of petty sessions, or commissioner for taking affidavits, or any perpetual commissioner, or town clerk, shire secretary, postmaster, postmistress, head teacher of State school, bank manager, or bank accountant, secretary of building society, minister of religion authorized to celebrate marriages within Victoria, or any other person authorized in that behalf by the Governor in Council:

And without the limits of Victoria—

Either a notary public or commissioner for taking affidavits, or else the mayor or other chief officer of any city or municipal corporation within the United Kingdom of Great Britain and Ireland, or the officer administering the government of or the judge of any court of record in any British possession, or the British consular officer (which expression shall include consul-general, consul, and vice-consul and any person for the time being discharging the duties of consul-general, consul or vice-consul) at any foreign place; the agent-general of the State of Victoria in the United Kingdom; the mayor or other chief officer of any city or municipal corporation in any of the States of the Commonwealth of Australia, New Zealand, or other British possession; the police magistrate, resident magistrate, stipendiary magistrate, or special magistrate, in any of the said States, New Zealand, or other British possession; the manager or accountant of any branch of any

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bank incorporated under the law of the Commonwealth of Australia, or of any of the States thereof, or of the Dominion of New Zealand, or of the United Kingdom of Great Britain and Ireland; the registrar-general or recorder of titles in any of the said States; a justice of the peace in any of the States of the Commonwealth of Australia; and any other person whosoever who is authorized in that behalf by the Governor in Council.

Such witness, whether within or without the limits of Victoria, may also be any other person; but in such case he shall appear before one of the officers or persons aforesaid, who after making due enquiries of such witness shall endorse upon the instrument or power a certificate in the form in the eighteenth schedule; and such certificate shall be deemed sufficient proof of the due execution of such instrument or power. Where an instrument or power of attorney purports to be attested, or a certificate purports to be signed as aforesaid, the registrar may take official notice of such signature, and of the fact that the person attesting or signing possessed the requisite qualification. No fee shall be demanded or taken by any registrar, assistant registrar, or justice of the peace for attesting within Victoria any instrument or power of attorney under this Act; and any registrar, assistant registrar, or justice of the peace who demands or takes any such fee shall be liable to a penalty of not less than five nor more than twenty pounds.

Nothing in this section shall limit or affect the provisions of the Evidence Act 1915 enabling instruments to be attested without the limits of Victoria.

V. 1916, s. 24. The signature of every person, by whom any application, instrument, or other document is required to be signed or attested, shall be written in ink.

Id. s. 25. Every person, authorized by or under the Transfer of Land Acts to attest instruments, shall state truly in the attestation clause at what place the instrument was signed by the person whose signature he purports to attest, and the forms of instruments specified in the schedules to any of such Acts shall be amended accordingly.

[And see the Execution of Instruments Act 1915—"An Act to facilitate the execution of instruments and powers of attorney during the present war"—under which documents signed by a person "engaged in war service . upon verification to the satisfaction of the registrar of titles of the signature thereto, shall although not attested be held to be duly executed."]

PART IX. REGISTRATION ABSTRACTS, SEARCH CERTIFICATES, AND STAY ORDERS.

[192-195: V. 1890, ss. 153-156, Aust. Torr. Syst. 547, 548.]

196. Any person desiring to learn whether a proprietor is able to deal with the land comprised in his certificate, free from obstruction caused by any caveat or instrument lodged for registration, order, injunction, or other cause known to the registrar but not appearing upon the certificate, may sign an application for a search certificate in the form in the twentieth schedule; and on payment of the fee in that behalf provided, the registrar shall cause the necessary searches and enquiries to be made for the purpose of affording the information

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required; and the result thereof shall be certified in the form in the said schedule contained, by affixing the seal of the office, with the initials of the officer attaching the same, and the day, hour, and minute at which the seal is affixed.

197. Such search certificate shall refer to the dealing or incumbrance last noted on the certificate of title, for the purpose of showing the state of the register at the time of issuing the search certificate, but not of informing the person applying for the search certificate as to what is upon the certificate of title; and such person shall be entitled to inspect the certificate of title, and shall be deemed to know all of which an inspection of the certificate of title would have informed him.

198. Any person proposing to deal for value with a proprietor may, with the consent in writing of such proprietor, or his agent authorized in writing in that behalf, and on stating the particulars of the proposed dealing, lodge with the application for search certificate an application for stay of registration in the form in the twenty-first schedule; and if the result of the search shows that the proprietor is free to deal, the registrar shall, on payment of the fee in that behalf provided, sign an order in the form in the said schedule staying registration of any instrument affecting the land to be comprised in the proposed dealing for forty-eight hours from the time mentioned in the search certificate, and the said order shall be affixed to the certificate and a copy thereof given to the applicant.

199. If within the said period of forty-eight hours a properly perfected instrument effecting the puroposed dealing is duly lodged for registration, such instrument shall have priority over any other instrument which is lodged for registration after the time mentioned in the search certificate, and the same shall be registered notwithstanding any caveat, copy of writ, or application by an assignee or trustee in insolvency, which has been lodged in the office after the time mentioned in such search certificate.

200. Subject to the lodging of such duly perfected instrument within such period, any other instrument, and any caveat, copy writ, or application received in the office during such period, shall be dealt with in the same manner, shall have the same priority as between themselves, and shall be as effectual, as if no stay of registration had been obtained.

Part X. Surveys, Plans, Parcels and Boundaries.

201. On an application made to bring land under this Act, or to have a certificate of title amended as to the description of land therein as hereinafter authorized, and on any proposed subdivision under section 211 of this Act, the commissioner may require such survey and plans to be made, and such particulars of the boundaries, abuttals, adjacent buildings of stone or brick, area, and position to be furnished at the cost of the applicant or registered proprietor as the commissioner thinks fit. All surveys required by the commissioner in bringing land under this Act shall be made by a licensed surveyor, unless the commissioner otherwise directs.

[202-210: V. 1890, ss. 163-171, Aust. Torr. Syst. 549-553. See also Real Property Act 1915 (No. 2719), ss. 150-156, a re-enactment of ss. 211-217 of the Real Property Act 1890, printed in Aust. Torr. Syst. 595-598.]

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211. Any proprietor subdividing any land under the operation of this Act for the purpose of selling the same in allotments shall deposit with the registrar a map of such land if so required. Such map shall exhibit distinctly delineated all roads, streets, passages, thoroughfares, squares, or reserves appropriated or set apart for the use of the purchasers, and also all allotments into which the said land is divided, marked with distinct numbers or symbols, and shall also show the areas, and shall be declared to be accurate by a statutory declaration of a licensed surveyor.

212. After the subdivision of land and deposit of plan under the last preceding section, the numbers of the allotments marked upon such plan may be used as sufficient description of the land, for the purpose of dealings with any one or more of such allotments on the sale thereof according to such plan of subdivision, and on any subsequent dealings comprising the whole of one or more allotment or allotments.

213. On an application to bring land under this Act, or for an amended certificate, the land included in the certificate to be issued shall, at the request of the applicant, and may at the discretion of the commissioner, notwithstanding sections 24 and 47 and the third schedule, be described by its abuttals, both in the body of the certificate and in the plan thereon, or in the plan only. Any abuttal so used may be described by the name by which it is commonly known, and with or without the name of its reputed owner; and if the abuttal is upon or consists of land under this Act, the volume and folio of the certificate of the land constituting the abuttal, or on which the abuttal stands, shall be mentioned; and abuttals shall be used in addition to and not in substitution for dimensions, unless the commissioner specially authorizes the land, or any boundary of the land, being described by abuttals only.

214. For the purpose of this Act, any of the objects hereinafter mentioned may be mentioned as an abuttal:—Any building, wall, sectional division of party wall, fence, public or private street or road, lane or passage, land dedicated to or reserved for the public, Government reserve, Crown section allotment or portion, land described in any certificate of title, and any bay, lake, river, creek, or natural or artificial water-course; and mention of an abuttal in any certificate of title shall not be deemed to give title to the abuttal, or to be evidence of the title of any person who is referred to in the description as owner or occupant of the land upon which any abuttal stands, or of any land constituting an abuttal.

Part XI. Rectification of Certificates.

215 [Am. 1916, s. 14]. A proprietor may apply to have his Crown grant or certificate of title amended, in any case in which the boundaries, area, or position of the land therein described differ from the boundaries, area, or position of the land actually and bonâ fide occupied by him, and purporting to be so occupied under the title in respect of which the certificate issued, or in any case in which the description in the certificate is erroneous or imperfect on the face of it. An amendment made pursuant to an order in an application under this section shall, unless the commissioner otherwise orders, be deemed to

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have been made as on the date when the application was lodged with the registrar, and bear date accordingly.

216. A proprietor may apply for the rectification of the original and duplicate certificate of any other proprietor or proprietors, in any case in which the land described in the applicant's certificate, and actually and bonâ fide occupied by him, comprises land which by reason of any error in survey or other misdescription is included in the land described in any other certificate or certificates.

217. Any application to be made as aforesaid shall be in the form set forth in the twenty-third schedule, and the attorney of any corporation registered as proprietor may apply on behalf of the corporation in manner provided by section 18.

[218, 220, 221: V. 1890, ss. 179, 181, 182, Aust. Torr. Syst. 554, 555.]

219. [1916, s. 15]. In any case in which the granting of an application to be made as aforesaid, or of an application to bring land under this Act, would affect land comprised in any other certificate or Crown grant, or cause a certificate to issue which would be inconsistent with any other certificate or Crown grant, the commissioner shall, in addition to any other notices which he requires, direct notice of the application to be served upon all persons appearing by the register to be the owners of an estate in fee simple in, or lessees or mortgagees of, the land which would be affected, or the land comprised in the certificate or Crown grant as to which the inconsistency would arise, accompanied by a plan showing accurately the extent to which the certificate or Crown grant thereof would be affected if the application was granted, and a copy of such plan shall until such application has been finally dealt with be kept open for inspection at the office of titles.

222 [Am. 1916, s. 16[. On any application under sections 215 or 216, or to bring land under this Act, the commissioner may grant the same, although the certificate to be issued or the rectification of the register to be made upon such application may affect land comprised in any other certificate or Crown grant, if it appears that the land so affected has been included in such other certificate or Crown grant, by reason of some error in survey or other misdescription, unless the title to the land so affected has been theretofore determined in a contested proceeding under this Act, or in any court of competent jurisdiction in which the right to the possession of such land was in question.

223 [Am. 1916, s. 17]. Upon granting any such application, the commissioner shall direct the registrar to rectify the register by making the requisite alteration in the original of any other certificate or Crown grant, accompanied by a statement made and signed by him in the register book of the circumstances under which the rectification has been made; and the registrar shall make the requisite alteration in the duplicate certificate or Crown grant when brought to him for that purpose, or when the same is lodged in or brought to the office for the purpose of any dealing with the land comprised therein, and may detain the duplicate until the rectification thereof is completed; and the registrar may refuse to register any dealing with the land, or any estate or interest therein, until the duplicate has been brought in for rectification.

224 [1916, s. 18]. Upon rectifying the original of any certificate or Crown grant as hereinbefore mentioned, the registrar shall give notice in writing to the proprietor of the land comprised in the cer-

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tificate or Crown grant, informing him of the rectification, and that on the duplicate certificate or Crown grant being brought into the office of titles a new duplicate certificate, with an amended description showing accurately the land then comprised in the certificate or Crown grant will be issued to him free of cost; and on the same being brought in, the proprietor shall be entitled to receive a new duplicate certificate with an amended description, in substitution for the duplicate certificate or Crown grant so brought in; and every new certificate so issued shall bear the same numbers as the certificate or Crown grant for which it is substituted, with the word 'substituted' prefixed to the volume and folio.

PART XII. SPECIAL POWERS AND DUTIES OF THE COMMISSIONER AND REGISTRAR.

225. The commissioner may, by summons under his hand in the form in the twenty-fourth schedule, require the proprietor or mortgagee, or other person interested in any land under the operation of this Act, in respect of which any transfer, lease, mortgage, charge or other dealing, or any discharge from any mortgage or charge, is proposed to be transacted or registered, or in respect of which any transmission is proposed to be registered, or registration abstract issued, to appear at a time and place to be appointed in such summons and give any explanation concerning such land, or any document affecting the title thereto, and to produce any grant, certificate of title, will, mortgage, or other instrument or document in his possession or within his control affecting such land or the title thereto; and the commissioner is hereby authorized to examine upon oath (which oath he is hereby empowered to administer) any such proprietor, mortgagee, or other person as aforesaid; and any such proprietor, mortgagee, or other person who fails, refuses or neglects to attend the commissioner for the purpose of being examined, or to produce any such document, or allow the same to be inspected, or refuses or neglects to give any such explanation as aforesaid, shall be liable on any such default to be dealt with as in the case of a contempt of the Supreme Court; and if the information or document withheld appears to the commissioner to be material, the registrar shall not be bound to proceed with the transaction.

226 [1916, s. 19]. (1) The commissioner may with the consent of the Governor in Council make regulations in respect to the following matters:—

(i) The parcels of land that may be included in one certificate of title.

(ii) The quality and size of the paper to be used for applications, instruments, and other documents to be lodged with the registrar.

(iii) The preparation of such applications, instruments, and other documents.

(iv) The forms to be used for applications, instruments, and other documents to be lodged with the registrar, but any such regulation and the forms thereunder shall be subject to the provisions of section 279 of [this] Act.

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(v) The licensing of persons, including the registrar, to sell the prescribed forms.

(vi) Any other matter or thing relating to or connected with any of the above-mentioned matters which it may be expedient to prescribe by regulation.

(2) The commissioner may also with the like consent by regulation—

(i) make such alterations in the several forms in the several schedules hereto as he deems requisite; and

(ii) repeal or alter any regulation made under this section; and every form authenticated by the seal of the office shall be taken to be in the legally authorized form, unless the contrary is proved.

227. Whenever any person interested in land under the operation of this Act, or any estate or interest therein, appears to the Supreme Court or to a county court in its equitable jurisdiction, or to the commissioner to be a trustee of such land, estate, or interest within the intent and meaning of any Act now or hereafter to be in force relating to trusts and trustees, and any vesting order is made in the premises by either of the said courts or by the commissioner (which order he is hereby empowered to make concurrently with the Supreme Court), the registrar, on being served with such order or an office copy thereof, shall enter in the register book and on the duplicate grant or certificate of title, and duplicate instrument (if any), the date of the said order, the time of its production to him, and the name and addition of the person in whom the said order purports to vest the said land, estate or interest; and upon such entry in the register book such person shall become the transferee, and be deemed to be the proprietor thereof. Unless and until such entry is made, the said order shall have no effect or operation in transferring or otherwise vesting the said land, estate or interest.

228 [Am. 1916, s. 20]. If it is proved to the satisfaction of the commissioner that land under this Act has been sold by the proprietor, and the whole of the purchase money paid, and that the purchaser or those claiming under him has entered and taken possession under such purchase, and such entry and possession have been acquiesced in by the vendor or his representatives, but that no transfer has ever been executed by the vendor, and cannot be obtained by reason that the vendor is dead or residing out of the jurisdiction or cannot be found, the commissioner may in his discretion make a vesting order in the premises, and the registrar on being served with such order shall make the entries directed to be made by the last preceding section of this Act in the case of the vesting orders therein mentioned, and the making or the omission to make such entries shall be attended by the same results as declared by the said section in respect of the vesting orders therein mentioned.

229. If it is proved to the satisfaction of the commissioner that the rights of an official assignee or trustee in insolvency, or of an execution creditor, notified as an incumbrance on the certificate, have been fully satisfied, extinguished or otherwise determined, and no longer affect the land comprised in the certificate, the commissioner may either direct a statement to that effect signed by the registrar to be endorsed on the certificate, or permit any subsequent certificate dealing with the same land to be issued free from such incumbrance.

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230. On proof to the commissioner that any judgment, of which a copy writ of execution has been entered under section 178 has been satisfied before the period for which such entry is operative has elapsed, the commissioner may write the word "satisfied" with his signature and the date of the signing upon or below the entry of copy writ in the register book, and thereupon such writ shall cease to affect the land as to which the entry was made.

231. If at the time when any mortgage, conveyance, or transfer on sale of any real property, or any application or consent under this Act which is liable to duty under parts II. and III. of the Stamps Act 1915, is left at the titles office, there is affixed thereto an adhesive stamp uncancelled or only partially cancelled, it shall be competent for any officer authorized by the commissioner or registrar to cancel such stamp as if he was the person by whom it was affixed, and upon his so doing such mortgage, conveyance, transfer, application, or consent shall be deemed to be duly stamped, and as valid in all respects as if the stamp had been duly cancelled by the person by whom it was affixed: provided that, in the case of receipts and conveyances or transfers on sale, the stamps shall be so cancelled subject to the penalties and within the times provided by section 28 of the Stamps Act 1915.

232 [Am. 1916, s. 21]. Upon the receipt of the probate of any will, or of any letters of administration, or of a rule to administer granted to the curator, or of any rule or order whereby it appears that any person has been appointed or constituted the executor or administrator of any deceased person, or upon the receipt of an office copy of any such probate, letters of administration, rule to administer, rule or order, and upon the notification in the Government Gazette of the appointment of any succeeding curator, the registrar of titles shall, on an application in writing of the executor, administrator, or curator (as the case may be) to be registered as proprietor in respect of any land therein described, enter in the register book, upon the leaf constituted by the grant or certificate of title of such land, a memorandum notifying the appointment of such executor, administrator or curator, and the day of the death of the proprietor when the same can be ascertained, and upon such entry being made such executor, administrator, or curator shall become the transferee and be deemed to be the proprietor of the estate or interest of the deceased proprietor in such land, or of such part thereof as then remains unadministered, and shall hold the same subject to the equities upon which the deceased held the same, but for the purpose of any dealings with such land under the provisions of this Act every such executor, administrator, or curator shall be deemed to be the absolute proprietor thereof. If in any case probate or administration is granted to more persons than one, all of them for the time being shall join and concur in every instrument relating to the land. No contribution to the assurance fund under this Act shall be payable on the registration of such executor, administrator or curator.

233. The registrar may exercise and shall perform the following powers and duties (that is to say):—

(i) He may administer an oath, and may take and receive the declaration of any person voluntarily making the same, and in this Act the expression "statutory declaration" shall be deemed to include any declaration so taken and

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received, and such last-mentioned declaration shall for all purposes be deemed to be a statutory declaration within the meaning of that expression in the Evidence Act 1915.

(ii) He shall upon the direction of the commissioner correct errors in the register book, or in entries made therein or in duplicate certificates or instruments, and may supply entries omitted to be made under the provisions of this Act; but in the correction of any such error he shall not erase or render illegible the original words, and shall affix the date on which such correction was made or entry supplied, and initial the same; and every error or entry so corrected or supplied shall have the like validity and effect as if such error had not been made, or such entry omitted, except as regards any entry made in the register book prior to the actual time of correcting the error or supplying the omitted entry.

(iii) He shall upon the direction of the commissioner lodge a caveat on behalf of his Majesty, or on behalf of any person who is under the disability of infancy, coverture, lunacy, unsoundness of mind or absence from Victoria, to prohibit the transfer or dealing with any land belonging or supposed to belong to any such person, and also to prohibit the dealing with any land, in any case in which it appears that an error has been made by misdescription of such land or otherwise, in any certificate of title, or in any instrument, or for the prevention of any fraud or improper dealing.

234. The registrar may without the direction of the commissioner correct any patent error appearing on the face of any instrument lodged for registration, without such instrument being withdrawn from the office: Provided always that such correction be made in compliance with sub-section (ii) of the last preceding section, and such correction shall have the same validity and effect as if made under the direction of the commissioner under the said section.

[235-238: V. 1890, ss. 196-199, Aust. Torr. Syst. 560, 561.]

V. 1916, s. 22. (1) If at any time the registrar is of opinion that the production of any documents or evidence, or the giving of any notice, or the doing of any act, is necessary or desirable, then if such documents or evidence or notices are not supplied or given, or such act done, within such time as he allows—

(*a*) he may refuse to complete or proceed with a registration, or to do any act, or make any entry;

(*b*) he may thereupon return to the person by whom they were lodged all or such of the instruments and other documents lodged in connexion with the matter as he thinks fit, by delivering the same to him personally, or by sending the same through the post to him at his address; and

(*c*) the fees paid in respect of any such matter shall be forfeited and dealt with as a penalty, under section 235 of the principal Act.

(2) When the fees paid in respect of any matter are forfeited under this section, one-half only of the corresponding fees shall be charged in respect of any subsequent application for the same purpose,

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or in respect of any instrument or other document relodged for registration, provided that the requisition previously made has been complied with, or compliance therewith is not in the opinion of the registrar any longer necessary.

Id. s. 26. Whenever the condition of a duplicate certificate of title or Crown grant lodged with the registrar for any purpose is such that the registrar deems it inadvisable to re-issue the same, he may require a new certificate of title to be taken out.

Id. s. 30. The registrar may, upon the delivery up to him of a duplicate Crown grant or certificate of title, issue a new certificate of title in the place of the existing Crown grant or certificate of title, which shall thereupon be cancelled.

PART XIII. ASSURANCE FUND.

239. All sums of money which are received by the registrar as contributions to the assurance fund, or in augmentation thereof, shall be paid to the treasurer of Victoria, who shall place such sums to the credit of an account to be kept in the treasury to be called "the assurance fund," and shall from time to time invest the same, together with all dividends and profits thereon, in Victorian government securities, to constitute an assurance fund for the purposes hereinafter mentioned.

240. Whenever any amount has been paid out of the assurance fund on account of any person who is dead, such amount may be recovered from the estate of such person by action against his personal representatives, in the name of the registrar; and whenever such amount has been paid on account of a person who has been adjudged insolvent, the amount so paid shall be considered to be a debt due from the estate of such insolvent, and a certificate signed by the treasurer of Victoria certifying the fact of such payment out of the assurance fund, and delivered to the official assignee, shall be sufficient proof of such debt; and whenever any amount has been paid out of the assurance fund on account of any person who has absconded or who cannot be found within the jurisdiction of the Supreme Court, and has left any real or personal estate within Victoria, it shall be lawful for the said court or a judge thereof, upon the application of the registrar, and upon the production of a certificate signed by the treasurer of Victoria certifying that the amount has been paid in satisfaction of a judgment against the registrar as nominal defendant, to allow the registrar to sign judgment against such person forthwith for the amount so paid out of the assurance fund, together with the costs of the application, and such judgment shall be final and signed in like manner as final judgment by confession or default in an adverse action, and execution may issue immediately; and if such person has not left real or personal estate within Victoria sufficient to satisfy the amount for which execution has been issued as aforesaid, it shall be lawful for the registrar to recover such amount, or the unrecovered balance thereof, by action against such person at any time thereafter.

241. The assurance fund shall not under any circumstances be liable for compensation for any loss, damage, or deprivation occasioned by the breach by a proprietor of any trust, whether express, implied or constructive; nor in any case in which the same land has been included in two or more grants from the Crown; nor shall the assurance

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fund be liable in any case in which such loss or deprivation has been occasioned by any land being included in the same certificate of title with other land through misdescription of boundaries or parcels of any land, unless in the case last aforesaid it is proved that the person liable for compensation and damages is dead or has absconded, or has been adjudged insolvent, or the sheriff certifies that such person is unable to pay the full amount awarded in any action for recovery of such compensation and damages: Provided always that any amount paid out of the assurance fund on account of any person who has absconded may be recovered from such person by action, in the name of the registrar, at any time thereafter: provided also that the said fund shall be liable for such amounts only as the sheriff fails to recover from the person liable as aforesaid.

242 [Am. 1916, s. 23]. Upon granting an application made under this Act for amendment of a certificate, or made under this Act for the exercise by the commissioner of any of the powers conferred on him by sections 78, 79, 144, 204, 205, 228, 229, 271, and 272, or for the waiver of any requisition made in connexion with a proposed dealing under this Act, the commissioner may grant such application, conditioned upon the applicant contributing to the assurance fund such a sum of money as the commissioner certifies under his hand to be in his judgment a sufficient indemnity, by reason of the non-production of any document affecting the title, or of inability to obtain a consent, serve a notice, or comply with any other requisition made in the case, or by reason of the imperfect nature of the evidence of title, or as against any uncertain or doubtful claim or demand incident to or which may arise upon the title, or any risk to which the assurance fund may be exposed by the granting of the application.

PART XIV. ACTIONS AND OTHER REMEDIES.

243. The commissioner shall not, nor shall the registrar or any person acting under the authority of either of them, be liable to any action, suit, or proceeding for or in respect of any act or matter bonâ fide done or omitted to be done in the exercise or supposed exercise of the powers of this Act.

244. No action of ejectment, or other action for the recovery of any land, shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases (that is to say):—

(i) The case of a mortgagee as against a mortgagor in default:

(ii) The case of an annuitant as against a grantor in default:

(iii) The case of a lessor as against a lessee in default:

(iv) The case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bonâ fide for value from or through a person so registered through fraud:

(v) The case of a person deprived of or claiming any land included in any grant or certificate of title of other land, by misdescription of such other land or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bonâ fide for value:

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(vi) The case of a registered proprietor claiming under a grant or certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more grants, or two or more certificates of title, or a grant and a certificate of title, may be registered under the provisions of this Act in respect of the same land:

And in any case other than as aforesaid, the production of the registered grant, certificate of title, or lease shall be held in every court of law or equity to be an absolute bar and estoppel to any such action, against the person named in such document as the grantee, proprietor, or lessee of the land therein described, any rule of law or equity to the contrary notwithstanding.

245. Upon the recovery of any land, estate, or interest, by any proceeding at law or in equity, from the person registered as proprietor thereof, it shall be lawful for the court or a judge, in any case in which such proceeding is not herein expressly barred, to direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the register book relating to such land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to such order.

246. Any person deprived of land, or of any estate or interest in land, in consequence of fraud, or through the bringing of such land under the operation of this Act, or by the registration of any other person as proprietor of such land, estate or interest, or in consequence of any error or misdescription in any certificate of title, or in any entry or memorial in the register book, may bring and prosecute an action at law for the recovery of damages, against the person upon whose application such land was brought under the operation of this Act, or such erroneous registration was made, or who acquired title to the estate or interest through such fraud, error or misdescription: provided always that, except in the case of fraud or of error occasioned by any omission, misrepresentation, or misdescription in the application of such person to bring such land under the operation of this Act, or to be registered as proprietor of such land, estate or interest, or in any instrument signed by him, such person shall, upon a transfer of such land bonâ fide for value, cease to be liable for the payment of any damage which but for such transfer might have been recovered from him under the provisions herein contained; and in such last-mentioned case, and also in case the person against whom such action for damages is directed to be brought as aforesaid is dead, or has been adjudged insolvent, or cannot be found within the jurisdiction of the Supreme Court, then and in any such case damages with costs of action may be recovered out of the assurance fund, by action against the registrar as nominal defendant: provided also that in estimating such damages, the value of all buildings and other improvements erected or made subsequently to the deprivation shall be excluded.

247. Nothing in this Act contained shall be so interpreted as to leave subject to an action of ejectment, or to an action for recovery of damages as aforesaid, or for deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser bonâ fide for valuable consideration of land under the operation of this Act, on the ground that the proprietor through or under whom he claims was registered as proprietor through fraud or error, or has derived

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from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries, or of the parcels of any land, or otherwise howsoever.

248. [Am. 1916, s. 28]. If upon the application of any owner or proprietor to have land brought under the operation of this Act, or to have any dealing or transmission registered or recorded, or to have any certificate of title, registration abstract, foreclosure order, or other document issued, or to have any act or duty done or performed which by this Act is required to be done or performed by the registrar, the registrar refuses so to do, or if such owner or proprietor is dissatisfied with the direction upon his application given by the commissioner, it shall be lawful for such owner or proprietor to require the registrar to set forth in writing under his hand the grounds of his refusal, or the grounds upon which such direction was given; and such owner or proprietor may if he thinks fit at his own cost summon the registrar to appear before the Supreme Court, to substantiate and uphold the grounds of his refusal or of such direction as aforesaid, such summons to be issued under the hand of a judge and to be served upon the registrar six clear days at least before the day appointed for hearing the complaint of such owner or proprietor. Upon such hearing the registrar or his counsel shall have the right of reply; and the said court may, if any question of fact is involved, direct an issue to be tried to decide such fact; and thereafter the said court shall make such order in the premises as the circumstances of the case require; and the registrar shall obey such order, and all expenses attendant upon any such proceedings shall be borne and paid by the applicant or other person preferring such complaint, unless the court certifies that there was no probable ground for such refusal or direction as aforesaid. Where an application under section 87 of this Act for a vesting order is rejected by the commissioner, such rejection shall be deemed and taken to be a direction upon the application given by the commissioner within the meaning of this section.

249. Upon any summons or proceeding under the last preceding section, the court may, notwithstanding anything in the said section to the contrary, make such order as to the costs, expenses of, and attendant upon such summons or proceeding as it deems just; and all costs and expenses to be paid by the registrar under such order shall be paid out of the assurance fund.

250. Any person sustaining loss through any omission, mistake, or misfeasance of the registrar, or any other officer or clerk, in the execution of their respective duties under the provisions of this Act, or by any error, omission, or misdescription in any certificate of title, or any entry or memorial in the register book, or by the registration of any other person as proprietor, and who by the provisions of this Act is barred from bringing an action of ejectment or other action for the recovery of the land, estate or interest, may, in any case in which the remedy by action for recovery of damages as herein provided is inapplicable, bring an action against the registrar as nominal defendant, for recovery of damages; in estimating which damages however the value of all buildings and other improvements, erected or made subsequently to the loss of deprivation, shall be excluded.

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251. Any person sustaining any loss or damage by any rectification of a certificate under this Act, or by the bringing of land under this Act, if the rectification or the issue of the certificate by which such loss or damage was occasioned was in consequence of or justified by any inaccuracy in any survey or plan or description of land used upon any sale of land by the Crown, then notwithstanding the provisions of section 246 and section 250, but without prejudice to the rights (if any) of such person thereunder, may in the first instance, and without any obligation to pursue the remedies provided by such sections, bring an action against the registrar as nominal defendant, for recovery of damages, and may recover the damages awarded, together with the costs of the action, out of the assurance fund.

252. Any person who has sustained or hereafter sustains any loss or damage in or by the exercise by the commissioner of any of the powers conferred on him by this Act, or by the corresponding provisions of any Act heretofore in force, and who has not been party or privy to the application or dealing in connexion with which such power was exercised, may notwithstanding the provisions of section 246 and section 250, and without prejudice to the rights (if any) of such person thereunder, in the first instance, and without any obligation to pursue the remedies provided by such sections, bring an action against the registrar as nominal defendant, for recovery of damages, and may recover the damages awarded, together with the costs of the action, out of the assurance fund. And where such person has been party or privy to such application or dealing, he shall be at liberty to join the registrar as a nominal co-defendant, in any action brought by him in respect of such loss or damage against any other person or persons who has or have been party or privy to such application or dealing, and all damages and costs recovered against the registrar in such action, whether by the plaintiff or a co-defendant, may be recovered out of the assurance fund.

253. Any person sustaining loss or damage, in any case in which he is entitled to bring an action to recover damages against the registrar as nominal defendant, may before commencing proceedings against the registrar make application in writing to the commissioner for compensation, and such application shall be supported by affidavit or statutory declaration. If the commissioner admits the claim or any part thereof, and certifies accordingly to the attorney-general, thereupon the Governor may if he thinks fit issue a warrant to the treasurer for the amount so certified out of the assurance fund.

254. In any case in which an action for recovery of damages is permitted to be brought against the registrar as nominal defendant, notice in writing of such action, and of the cause thereof, shall be served upon such nominal defendant one month at least before the commencement of such action; and if in any such action judgment is given in favour of the nominal defendant, or the plaintiff discontinues or becomes nonsuit, the plaintiff shall be liable to pay the full costs of defending such action, and the same when taxed may be recovered in the name of the nominal defendant, by the like process of execution as in other actions.

255. If in any such action the plaintiff recover final judgment against such nominal defendant, then the judge before whom such action is tried, or the Supreme Court or a judge thereof, shall certify

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the fact of such judgment and the amount of damages and costs recovered; and the amount of such damages and costs shall be paid to the person recovering the same, and shall be charged to the account of the assurance fund; and in case the balance to the credit of the assurance fund shall be inadequate to defray the amount specified, such sum as is necessary for that purpose shall be paid out of the consolidated revenue; and the amount so advanced shall be repaid from the assurance fund as the same thereafter accrues.

256. No action for recovery of damages sustained through deprivation of land, or of any estate or interest in land, shall lie or be sustained against the registrar, or against the assurance fund, or against the person upon whose application such land was brought under the operation of this Act, or against the person who applied to be registered as proprietor in respect to such land, unless such action is commenced within the period of six years from the date of such deprivation: provided nevertheless that any person being under the disability of coverture (except in the case of a married woman entitled to bring such action), infancy, unsoundness of mind, or absence from Victoria, may bring such action within six years from the date on which such disability has ceased, so however that such action is brought within thirty years next after the date of such deprivation. The plaintiff in any such action, at whatever time it is brought, and the plaintiff in any action for the recovery of land, shall have judgment entered against him in any case in which the deprivation complained of has been occasioned through the bringing of land under the operation of this Act, if it is made to appear to the satisfaction of the judge before whom such action is tried that such plaintiff, or the persons through or under whom he claims title, had notice by personal service or otherwise, or was aware, that application had been made to bring such land under the operation of this Act, and had wilfully or collusively or negligently omitted to lodge a caveat forbidding the same or had allowed such caveat to lapse.

258. Nothing in this Act contained shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any civil proceeding in any court of law or equity or insolvency; but no such discovery or answer shall be admissible in evidence against such person in any criminal proceeding, except a proceeding for perjury, or for any offence against any Act relating to insolvency.

PART XV. OFFENCES.

[257, 259-263: V. 1890, ss. 218, 220-224, Aust. Torr. Syst. 567-569.]

PART XVI. MISCELLANEOUS.

264. A devisee, or other person claiming any estate of freehold in possession, or a power to appoint, transfer, or dispose of the same on a transmission, may make application in writing to the commissioner to be registered as proprietor thereof, and shall produce the will, or an office copy or probate of the will of the deceased proprietor, or letters of administration with his will annexed, or the settlement under which such applicant claims, and shall afterwards furnish such other evidence as is deemed necessary. Such application shall state the nature of

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every interest held by any other person at law or equity in the land, within the applicant's knowledge, and that he verily believes himself to be entitled to the estate in or power over such land in respect to which he applies to be registered, and shall also state the value of the property. The devisee, or other person making such application, shall deliver up the duplicate grant or certificate of title prior to his being entered in the register book as the proprietor.

265. Such application shall be referred to an examiner of titles for his examination and report, who shall afterwards submit the papers to the commissioner, who may either reject such application altogether or direct notice thereof to be published once at least in one newspaper published in the city of Melbourne, or circulating in the neighbourhood of the land, and such further publicity to be given to such application as he deems fit; and the commissioner shall appoint a time not less than fourteen days from the advertisement, or the first of such advertisements if more than one, upon or after which the registrar may, unless a caveat is lodged forbidding such registration, register such applicant as the proprietor of such land or estate, by entering in the register book the particulars of the transmission through which such applicant claims, and by registering a certificate of title to the land or estate so transmitted. Upon such entry being made, the applicant shall become the transferee of such land or estate, and be deemed to be the proprietor thereof: provided always that the person registered consequent on such direction shall hold such land or estate for the purposes for which it is applicable by law; but for the purpose of any dealings therewith under the provisions of this Act he shall be deemed to be the absolute proprietor thereof. The commissioner may direct a caveat to be entered by the registrar for the protection of the interests of any other persons interested in such land or estate.

266. Any person entitled in remainder, reversion, or otherwise on a transmission, may apply to be registered as so entitled in like manner, and supported by the like evidence as near as may be, as is herein provided with respect to a devisee or other person claiming an estate of freehold in possession. Such application shall be dealt with in the like manner as is mentioned in the last preceding section; and any entry made thereupon shall have the same effect, and the person registered shall hold the land for the same purposes, and shall have the same powers, as is and are mentioned in such section. If there is any doubt, dispute, or litigation under this or under either of the two last preceding sections, as to the true construction or legal validity or effect of any will or settlement relating to any freehold land or estate, or if the person entitled under any of the provisions of this Act to any land or estate under any will, settlement, or instrument cannot be ascertained, the Supreme Court sitting in the exercise of its equitable jurisdiction may appoint a person to be registered as the representative of such land or estate; and such person when registered shall become the transferee, and be deemed to be the proprietor thereof for the purposes of this Act, subject however to any directions which from time to time are given by the court sitting as aforesaid, touching the disposition thereof or the dealing therewith.

267. The commissioner, upon production of sufficient proof of the marriage of a female proprietor of any land, or of any lease, mortgage, or charge not appearing by the register book to be held for her sepa-

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rate use, accompanied by an application in writing, signed by such female proprietor, to register her husband as joint proprietor thereof in her right, shall direct the registrar to enter in the register book, and also upon the duplicate grant or certificate of title and duplicate instrument (if any) evidencing the title of such female proprietor when produced to him for that purpose, the name and addition of her husband, the date and place of the marriage, and the time of making such entry; and the husband of such female proprietor shall, on such entry being made in the register book, become a joint transferee thereof, and be deemed to be joint proprietor thereof in right of his wife. Until such entry is made, she shall be deemed to be the sole and absolute proprietor of such land, lease, mortgage or charge, and may transfer or otherwise deal with the same at law and in equity.

268. Upon the death, in the life-time of his wife, of any husband registered as joint proprietor with her of an estate in fee simple, or of a lease, mortgage, or charge in her right, or upon the death of any female proprietor whose husband is entitled as tenant by the curtesy to any freehold land, or upon the death of any person registered with any other person as joint proprietor of any land, or of any lease or charge, or as joint proprietor of any mortgage owned on a joint account in equity, the commissioner, on the application of the widow, husband, or person entitled, and proof to his satisfaction of such events as aforesaid, may direct the registrar to register such applicant as the proprietor thereof; and she or he shall, upon being registered in the manner herein prescribed for the registration of a like estate or interest, become the transferee of such land, lease, mortgage or charge, and be deemed the proprietor thereof, but as regards any tenancy by the curtesy for the lifetime only of such husband.

269. Without lessening or prejudicing any of the other rights, powers, and remedies hereby given and conferred, every proprietor, and every transferee when registered, of any land, lease, mortgage or charge shall, whilst continuing so registered, have the same estates, rights, powers and remedies, and be subject to the same engagements, obligations and liabilities, and may sue and be sued in his own name at law and in equity in respect thereof or thereupon, in like manner as if he had been the original proprietor of the land by or with whom the engagement, obligation, or liability sued upon was entered into or incurred, or the original lessee, mortgagee or annuitant.

270. The proprietor of any land, or of any lease, mortgage or charge shall, on the application of any beneficiary or person interested therein, be bound to allow his name to be used by such beneficiary or person in any action, suit, or proceeding which it is necessary or proper to bring or institute in the name of such proprietor concerning such land, lease, mortgage or charge, or for the protection or benefit of the title vested in such proprietor, or of the interest of any such beneficiary or person; but nevertheless such proprietor shall in any such case be entitled to be indemnified, in like manner as if being a trustee he would before the passing of this Act have been entitled to be indemnified in a similar case of his name being used in any such action, suit, or proceeding by his cestui que trust.

271. Upon an application to bring land under this Act, or to amend a certificate, if it is proved to the satisfaction of the commissioner that any land constituting a private road, street or way, or

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a portion thereof respectively, or subject to an easement of right of way, has been exclusively, continuously, and adversely occupied by the applicant, or by him and those through whom he claims, for a period of not less than thirty years, the commissioner may notwithstanding section 73 at his discretion issue a certificate for the fee simple of such land, without notifying such road rights or easement of right of way as an incumbrance, and thereafter the same shall not be preserved by section 72.

[272, 273: V. 1890, ss. 233, 234, Aust. Torr. Syst. 573.]

275. Upon the insolvency of the proprietor of any land, lease, mort-

be deemed to have affected the right of any person to obtain the registration of any dealing under this Act, or shall deprive or be deemed to have deprived any person dealing under this Act of the benefit of section 179 or of any other section.

275. Upon the insolvency of the proprietor of any land, lease, mortgage or charge, or upon any insolvent before obtaining his certificate of discharge becoming proprietor of any land, lease, mortgage or charge, his assignee or trustee shall be entitled to be registered as proprietor in respect of the same; and the registrar, upon the receipt of an office copy of the appointment of such assignee or trustee, accompanied by an application in writing under his hand to be so registered in respect of any land, lease, mortgage, or charge of such insolvent therein described, or of any estate or interest to which he was before the sequestration of his estate or after sequestration and before obtaining his certificate of discharge became entitled, or able to transfer or dispose of under any power of appointment or disposition which he might legally execute for his own benefit, shall enter in the register book upon the folium constituted by the grant or certificate of title of such land, or on the lease, mortgage or charge, a memorandum notifying the appointment of such assignee or trustee; and upon such entry being made, such assignee or trustee shall become the transferee, and be deemed to be the proprietor of such land, lease, mortgage or charge, estate or interest, and shall hold the same subject to the equities upon and subject to which the insolvent held the same, but for the purpose of any dealing therewith under the provisions of this Act such assignee or trustee shall be deemed to be the absolute proprietor thereof.

276. Until such application is made as aforesaid, and subject to the operation of any caveat which is lodged by such assignee, dealings by an insolvent proprietor with land under the operation of this Act may be registered, and thereupon shall not by the order of sequestration be affected either at law or in equity.

277. Subject to any express provisions to the contrary, an estate tail under this Act shall have the same incidents as a similar estate under the general law, and the proprietor of such an estate shall have the same power to bar the estate tail and create an estate in fee simple absolute, as against all persons whose estates are to take effect after the determination or in defeasance of the estate tail, as is possessed by the owner of a corresponding estate tail in land not under the Act by virtue of division I. of part V. of the Real Property Act 1915; but no acknowledgment as therein provided shall be necessary for dealing with an estate tail under this Act.

278. On any sale of land under the operation of this Act by public auction or private contract, the conditions set out in the table marked

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A in the twenty-fifth schedule may be adopted, by inserting the words "The conditions in table A of the Transfer of Land Act 1915 shall apply to this contract," and when so adopted the said conditions shall be construed as part of the contract, subject to any express modification or exclusion of any of them which may be contained in the contract.

279. The forms contained in the several schedules, and the forms for the time being in force under this Act, may be modified or altered in expression to suit the circumstances of every case; and any variation from such forms respectively in any respect, not being matter of substance, shall not affect their validity or regularity.

280. Any person may, on payment of the fee for the time being payable in that behalf, inspect the register book during the hours and upon the days of business. The registrar, on payment of the fee for the time being payable for a certified copy, shall furnish to any person applying for the same a certified copy of any grant, certificate of title, caveat, or registered instrument affecting land under the operation of this Act; and every such certified copy signed by him or by any assistant registrar, and authenticated by the seal of the office of titles, shall be received in evidence in any court of justice, or before any person having by law or by consent of parties authority to receive evidence, as primâ facie proof of the original grant, certificate, caveat or instrument, and of all the matters contained or recited in or endorsed thereon respectively.

281. (1) The Governor in Council may make regulations for all or any of the following purposes, so far as such regulations are not inconsistent with the provisions of this Act:—

(*a*) For prescribing the place or places for, and the mode, duration, and responsibility of the custody of, all or any undelivered Crown grants issued under the general law prior to the commencement of the Real Property Act number 140 of 1862, on which the fees to the Crown chargeable on delivery have not been paid; and

(*b*) For regulating the payment, collection, receipt of fees, contributions to the assurance fund under Act No. 140 being the Real Property Act of 1862, or under Act No. 301 being the Transfer of Land Statute of 1866, and other charges (if any) chargeable in respect of Crown grants issued before the date of the commencement of the said Real Property Act, or on unregistered Crown grants issued since that date, but prior to the first day of March, 1867, which have remained in the custody of the Crown unregistered by reason of the said charges not having been paid.

(2) All such regulations, when made by the Governor in Council, shall be published in the Government Gazette, and when so published shall have the force of law, and shall be judicially noticed, and shall be laid before both Houses of Parliament within fourteen days after the same shall have been made if Parliament be then sitting, and if not then within ten days after the next meeting of Parliament, and a copy of any proposed regulations shall be posted to each member of Parliament at least twenty-one days before such regulations are approved by the Governor in Council.

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SCHEDULES.

FIRST SCHEDULE.

Number of Act	Title of Act.	Extent of Repeal.
1149.....	Transfer of Land Act 1890...	So much as is not already repealed.
1174.....	Real Property Act 1890 (No. 2)	So much as is not otherwise repealed.
1875.....	Transfer of Land Act 1903....	The whole.
1931.....	Transfer of Land Act 1904....	So much as is not already repealed.
2046.....	Crown Grants Act 1906.....	The whole.
2086.....	Real Property Act 1907	Sections 6 and 7.
2094.....	Transfer of Land Act 1907....	The whole.
2529.....	Transfer of Land Act 1914.....	The whole.
2552.....	Transfer of Land Act 1890 Amendment Act 1914 (No. 2)..	So much as is not otherwise repealed.

[Of the remaining schedules only sch. 6 and sch. 25 (in part) are here printed; for other schedules not here printed, see V. 1890, Aust. Torr. Syst. 576 *et seq.* Sch. 6 is not contained in V. 1890. Sch. 25 has been added to and amended, and now differs slightly from V. 1890, sch. 25.]

SIXTH SCHEDULE.

VICTORIA.

Application for Vesting Order.

To the Commissioner of Titles—

I [*insert name address and occupation*] hereby apply for a vesting order vesting in me all that piece of land being [*describe land by reference to allotment and section giving volume and folium of existing certificate of title or Crown grant*] which land is delineated and coloured red upon the plan dated by A.B. a surveyor licensed under the Land Surveyors Act 1915 numbered in the Schedule hereto for an estate in fee simple in possession free from incumbrances (other than any special reservation exception or condition in the Crown grant) and I declare—

(1) *Set forth particulars of the possession on which the claim is based*—

(*a*) *The date on and circumstances in which the possession commenced.*

(*b*) *The name of the person by whom the possession was commenced.*

(*c*) *The duration of his possession and the nature thereof; and*

(*d*) *The subsequent history and nature of the possession up to the time of lodging the application.*

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(2) That there are no documents or evidences of title affecting such land in my possession or under my control other than those included in the Schedule hereto.

(3) That there are no mortgages or incumbrances registered on the above-mentioned title save and except the following:—[*Set out short particulars and state whether these mortgages or incumbrances have been extinguished or ceased to affect the land and, if so, how.*]

(4) That save as aforesaid I am not aware of any mortgage or encumbrance affecting the said land or that any person other than myself has any estate or interest therein [*if there be any add*] save and except [*and set out same*].

(5) That the names and addresses so far as known to me of the occupants of all lands contiguous to the said land are as follow:—

(6) That the names and addresses so far as known to me of the owners of all lands contiguous to the said land are as follow:—

(7) That the present value of the land including all improvements thereon is £ and no more.

Dated this day of One thousand nine hundred and .

Made and signed in the presence of

[*The applicant, if within Victoria, must sign before the registrar or an assistant-registrar or a notary public, a justice of the peace, commissioner of the Supreme Court of Victoria for taking affidavits, commissioner for taking declarations and affidavits, or perpetual commissioner; if without the limits of Victoria, before a notary public or a commissioner of the Supreme Court of Victoria for taking affidavits, or in the manner provided by the "Evidence Act 1915" for taking affidavits out of Victoria.*]

. . . .

TWENTY-FIFTH SCHEDULE [Am. 1916, s. 29].

TABLE A.

General Conditions of Sale.

1. The purchaser shall complete his purchase upon the day that the last of the acceptances or notes for purchase money become due; but he shall be entitled to the possession of the lot or lots purchased by him, or to the receipt of the rents and profits thereof, upon his acceptance of the title to such lot or lots; and if, from any cause whatsoever, his purchase shall not be completed at the time above specified, the purchaser shall pay interest on such of his acceptances or notes as shall become overdue at the rate of Eight pounds per cent. per annum to the time of completion, without prejudice however to the vendor's right under the sixth condition. As from the day of acceptance of title, the purchaser shall discharge outgoings, apportionments if necessary being made.

[Conditions 2-9: V. 1890, sch. 25, conditions 2-9, Aust. Torr. Syst. 591-593.]

10. If the purchaser shall not give any acceptances or notes but shall agree to pay the balance of purchase money by an instalment or instalments the words "instalment or instalments of purchase money" shall be read in these conditions instead of the words "acceptances or notes."

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WESTERN AUSTRALIA.

The principal Western Australia statute (1893, printed in Aust. Torr. Syst. 605 *et seq.*) has been further amended by Acts of 1909, 1911, and 1916. The Act of 1916 is identical with a Victorian statute—Execution of Instruments Act 1915—dealing with the execution of instruments by persons on war service, referred to *ante*, p. 445. The Acts of 1909 and 1911 are here printed; five sections of the 1893 Act (ss. 4, 78, 90, 105, 133) are directly amended or replaced by other enactments, and the amending Acts otherwise relate chiefly to Crown leases.

TRANSFER OF LAND ACT AMENDMENT ACT 1909

(No. 54 of 1909).

An Act to further amend the Transfer of Land Act 1893.

[*Assented to 21st December, 1909.*]

BE it enacted [&c.]

1. This Act may be cited as the Transfer of Land Act Amendment Act 1909, and shall be read as one with the Transfer of Land Act 1893, hereinafter referred to as the principal Act, and shall come into operation on a day to be fixed by proclamation.

2. Section 4 of the principal Act is amended as follows:—

(*a*) By adding to the word "fee," in line twenty-three, the words "and shall also include Crown leases."

(*b*) By adding the following sub-section:—"Crown lease" shall mean every lease or other holding of Crown lands under the Land Act 1898, or any regulation thereby repealed, granted for or extending over a period of five years or more.

3. (1) Every Crown lease issued after the commencement of this Act shall be issued in duplicate under seal, and be forwarded by the minister for lands direct to the registrar, for registration under sections 53 and 54 of the principal Act.

(2) The registrar shall

(*a*) Enter in a journal particulars of the lease, and mark on each part thereof the number appearing in such journal, and sign his name to each part;

(*b*) Retain one part (to be called the original), and deliver the other part (to be called the duplicate) to the lessee or, in the case of a mortgage, to the mortgagee; and

(*c*) Register the original in the register of leases.

4. (1) A Crown lease issued before the commencement of this Act may be made subject to and registered under the operation of the principal Act, by an application in the form in the schedule hereto.

(2) Such application may be made by the lessee or any person claiming through him, or by any mortgagee, and shall be accompanied by—

(*a*) The instrument of lease and certified copies of all existing mortgages, sub-leases, and other dealings (if any) registered under the Land Act 1898; and

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(*b*) A certified copy of the lease to be supplied by the department of lands and surveys to the applicant for such purpose; and

(*c*) The written consent of all registered mortgagees; and

(*d*) In applications by mortgagees, the written consent of the lessee.

(3) The registrar shall refer such application to the commissioner for his direction, and if the commissioner is satisfied as to the title of the applicant he shall direct the registrar to bring the land under the Act, either forthwith or after advertisement.

(4) When the registrar is satisfied that the preceding provisions of this section have been complied with, he shall—

(*a*) Enter in a journal particulars of the lease, and of all existing mortgages and sub-leases, and mark on the lease and the certified copy the number appearing in the journal, and endorse on the lease and certified copy all existing mortgages and sub-leases, and sign his name to the lease and certified copy and such endorsements; and

(*b*) Retain and register in the register of leases the original lease instrument, and deliver the certified copy to the lessee, or in the case of a mortgage, to the mortgagee.

(5) Any mortgage or sub-lease of a Crown lease made prior to the lease being registered under this section, and which is still operative—

(*a*) Shall be recorded on the original instrument of lease, and on the certified copy; and

(*b*) When so recorded, shall he read as if it contained all the covenants, powers, and conditions which by the principal Act are implied in mortgages or sub-leases, or conferred upon the parties thereto, except so far as such mortgage or sub-lease contains express provisions to the contrary.

5. When a Crown lease is signed by the registrar, it shall be deemed to be registered and, subject to this Act, may be transferred, sub-leased, and dealt with in like manner as if it had been granted by a registered proprietor and registered in the ordinary way, and the several provisions of the principal Act with respect to freehold land shall apply to such Crown lease, and every mortgage or sub-lease thereof, whether granted before or after the commencement of this Act, with such variations only as the difference in the nature of such property requires, or as may be necessary to render such provisions applicable to leaseholds for years.

6. (1) No transfer, sub-lease, or mortgage of a Crown lease or of a sub-lease thereof, shall be registered until the written consent thereto of the minister of lands, or of an officer of the department of lands and surveys thereto authorized by the minister for lands, has been filed with the registrar.

(2) Nothing in this Act or the principal Act contained shall affect the provisions of the Land Act 1898, whereby a transferee or sub-lessee is required to he a person who is not disqualified under that Act to be a lessee of the land intended to be transferred or sub-let.

7. No order of foreclosure shall he made in respect of a mortgage of a Crown lease without the consent in writing of the minister for lands.

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8. (1) The registrar, upon receipt of written notice from the minister for lands that any Crown lease has been forfeited or determined, in whole or in part, shall make an entry to that effect on the original lease, and call in the lessee's part thereof.

(2) If there is a mortgage or sub-lease registered against the lease so forfeited or determined, the registrar shall post to the mortgagee or sub-lessee, at the address appearing in the register, thirty days' notice of his intention to make such entry within which time the mortgagee or sub-lessee may carry out the conditions of the lease and apply to the minister for lands to waive the forfeiture.

(3) The minister for lands may, by notice to the registrar, allow a longer period than thirty days.

(4) Unless the forfeiture or determination is cancelled by the Governor in Council under the Land Act 1898, or is waived by the minister for lands under sub-section 2 of this section, then at the expiration of such days, or such longer period as the minister for lands shall allow, such forfeiture and determination shall become absolute.

9. (1) Every person who for the time being is the holder of a Crown lease shall, for all purposes in connexion with transferring, subletting, mortgaging, or otherwise dealing with the lease, have the same capacity as if he were and shall be deemed of full age.

(2) The provisions of this section shall be deemed to have applied to all holdings under the Land Act 1898, from the first day of January, 1899.

(3) The terms and conditions of any such transfer, sub-lease, mortgage, or other dealing may be renewed and altered upon application in chambers to a judge of the Supreme Court.

10. (1) Sections 92, 93, and 94 of the principal Act shall not apply to Crown leases.

(2) Sections 80, 122, and 138 to 144 (a) inclusive of the Land Act 1898, and sections 74 to 83 inclusive of the Land Act Amendment Act 1906, shall not apply to Crown leases registered under this Act, and section 15 of the Land Act Amendment Act 1900 shall, in reference to Crown leases registered under this Act, be read subject to section [8] of this Act.

11. Section 78 of the principal Act is amended, by inserting after the word "sheriff" the words "or the magistrate of a local court."

12. Section 90 of the principal Act is amended, by inserting after the word "sheriff" the words "or magistrate of a local court," and by inserting after the words "fi fa." the words "or warrant of execution," and by striking out the words "three months" and inserting "four months" in lieu thereof.

13. Section 105 of the principal Act is repealed, and the following section shall be read in lieu thereof:—

105. (1) The proprietor of any land under the operation of this Act may mortgage the same, or may charge the same with the payment of an annuity.

(2) A mortgage or charge may be in the form in the fourteenth and fifteenth schedules respectively to this Act.

(3) If a mortgage includes freehold land and a Crown lease, the registrar may require a duplicate or certified copy of the mortgage to be lodged for registration.

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(4) A mortgage, charge, or lease may be extended, by an instrument of extension executed by all the parties to such mortgage, charge, or lease, and stating the term of the extension, and the terms and conditions on which the extension is made.

(5) On production to the registrar of such instrument and of the duplicate mortgage, charge, or lease, he shall retain such instrument, and enter a memorandum of such extension on the original instrument of mortgage, charge or lease filed in the office of titles, and also on the certificate of title or, in the case of a Crown lease, on the register of leases.

(6) No dealing registered subsequent to any mortgage, charge, or lease shall be affected by the extension of any such mortgage, charge or lease, unless the proprietor in whose favour such dealing was registered shall have consented in writing to such extension.

14. Section 133 of the principal Act is amended by adding a paragraph as follows: "Every such writ shall cease to bind, charge or affect any land, lease, mortgage, or charge specified as aforesaid, unless a transfer upon a sale under such writ shall be left for entry upon the register within four months from the day on which the copy was served."

15. Any certificate of title may contain a statement therein, or entry thereon, to the effect that the land therein described has appurtenant thereto any easement, or that the person therein named is entitled to any easement in gross, or that the land therein described is subject to any right-of-way or other easement.

16. Every such statement or entry shall set forth a true and accurate description of the easement, or if the instrument creating the same is deposited in the lands titles office, shall refer to such instrument, and the certificate of title shall contain a plan of the land over which such easement extends, or if a plan showing the extent of such easement is deposited in the lands titles office, shall refer to such plan.

17. The assurance fund shall not be liable for compensation for loss, damage, or deprivation occasioned

(*a*) by any breach by a registered proprietor of any trust, whether express, implied or constructive, or by the improper exercise of any power of sale expressed or implied in any mortgage or incumbrance, or

(*b*) to any person claiming under any unregistered instrument, document or writing, or any equitable mortgage or charge by deposit or otherwise without writing, or any other interest not protected by caveat, by or in consequence of the issue to any registered proprietor of a special certificate.

18. The forms in the seventeenth schedule of the principal Act shall be read with reference to any transfer pursuant to a sale under a warrant of execution issued under the Local Courts Act 1904, as if the words "warrant of execution issued out of a local court" were inserted in place of "writ of fieri facias issued out of the Supreme Court," and as if the words "magistrate of the local court" were inserted in place of the word "sheriff."

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THE SCHEDULE.

Application to register a Crown Lease under the Transfer of Land Act 1893.

To the Registrar of Titles.

I [*insert name, address, and occupation*] hereby apply to have the land hereinafter described brought under the operation of the *Transfer of Land Act* 1893. And I declare—

1. That I am the lessee [*or* mortgagee *or as the case may be*] of a Crown lease of ALL THAT

2. That there are no documents or evidences of title affecting such land in my possession or under my control other than those included in the schedule hereto.

3. That I am not aware of any mortgage or incumbrance or sublease affecting the said land or that any other person has any estate or interest therein at law or in equity [*if there are any add* other than as follows *and set the same forth.*]

Dated this day , One thousand nine hundred and .

Made and subscribed at , in the presence of

[*The applicant if within Western Australia to sign before the registrar or an assistant registrar, or a notary public, justice of the peace, or commissioner for taking affidavits; if abroad before a notary public or a commissioner for taking affidavits in the Supreme Court of Western Australia.*]

SCHEDULE OF DOCUMENTS REFERRED TO.

TRANSFER OF LAND ACT AMENDMENT ACT 1911

(No. 26 of 1911).

An Act to further amend the Transfer of Land Act 1893.

[*Assented to 16th February, 1911.*]

BE it enacted [&c.]

1. This Act may be cited as the Transfer of Land Act Amendment Act 1911, and shall be read as one with the Transfer of Land Act 1893.

2. (1) Where the holder of a Crown lease has executed a mortgage thereof, either before or after the commencement of this Act, and the holder for the time being under the provisions of such Crown lease becomes entitled to a Crown grant in fee simple of the land comprised in and demised by such lease, the mortgage shall, by the operation of this Act, be transferred and apply to such Crown grant, and to the land thereby granted, in all respects as if such Crown grant had been referred to in the mortgage, and a memorandum of such mortgage shall be endorsed by the registrar of titles as an incumbrance on such

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Crown grant, and on the folium of the register book, on his registering such grant, and a memorandum stating the fact of such transfer shall also be made by the registrar of titles on the original registered instrument of mortgage and the duplicate thereof.

(2) This section shall be deemed to have been in operation from the commencement of the Transfer of Land Act Amendment Act 1909.

3. Section 10 of the Transfer of Land Act Amendment Act 1909 is amended, by omitting the word "nine," in the last line, and inserting "eight" in place thereof.

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PAPUA.

REAL PROPERTY ORDINANCE 1913

(No. 13 of 1913).

NOTE.—This statute is chiefly a consolidation adapted from the Queensland statutes, omitting the enactments relating to initial applications and registration abstracts, and inserting a few sections not in Queensland statutes, but for the most part taken from other Australian statutes. Only those sections are here printed or referred to, with respect to which the Papua statute differs materially, from the Queensland statutes.

AN ORDINANCE.

To Consolidate and Amend the Laws relating to the Transfer and Incumbrance of Freehold and other Interests in Land in the Territory of Papua.

[*14th August, 1913.*]

Be it enacted by the Lieutenant-Governor of the Territory of Papua, with the advice and consent of the Legislative Council thereof, as follows:—

. . . . . .

3. The following enactments are repealed:—The Real Property Act of 1861, 25 Vic. No. 14 (Queensland adopted); The Real Property Act of 1877, 41 Vic. No. 18 (Queensland adopted); The Real Property Ordinance of 1889, No. 11 of 1889; The Registrar of Titles Ordinance of 1903, No. 5 of 1903.

4. (1) All lands, estates, and interests which, at the commencement of this Ordinance, are subject to the provisions of the enactments so repealed shall be subject to the provisions of this Ordinance.

(2) All rules, forms, and orders made under the provisions of any Ordinance hereby repealed, and in force at the commencement of this Ordinance, shall be deemed to have been made under the corresponding provisions of this Ordinance.

(3) All applications duly made, registrations duly effected, proceedings duly commenced or had, and acts or things duly done under the enactments hereby repealed, shall be deemed to have been duly made, effected, commenced, had, or done respectively under the corresponding provisions of this Ordinance, but at the date on which the same were in fact made, effected, commenced, had or done.

(4) All laws, statutes, Acts, Ordinances, rules, regulations, and practice whatsoever relating to freehold and other interests in land, and operative on the sixteenth day of November, 1889, are, so far as inconsistent with the provisions of this Ordinance, hereby repealed so far as regards their application to land under the provisions of this Ordinance.

(5) All persons appointed under or by virtue of any enactment hereby repealed, and holding office at the commencement of this Ordinance, shall remain in office as if this Ordinance had been in force at the time they were appointed and they had been appointed and had

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taken the requisite oath of office (if any) hereunder, and this Ordinance shall apply to them accordingly.

(6) Nothing in this Ordinance contained shall be deemed to affect or control the provisions of the Married Women's Property Ordinance 1912.

. .

PART IV. CROWN LEASES.

32. (1) Leases granted under the Land Ordinance 1911 shall, when executed, be deemed to be Crown leases, and shall be in the form provided for leases under this Ordinance, or to the like effect, which may be altered from time to time with the approval of the Lieutenant-Governor, and shall be in duplicate, and, after being duly executed, shall be forwarded to the registrar, who shall bind one copy in a book, to be called the " register of Crown leases," and shall forward the other to the person entitled thereto.

(2) The registrar shall mark on each part of every Crown lease, a copy whereof shall be bound in the register of Crown leases, the volume and folio as appearing in the register of Crown leases; and such Crown lease shall thereupon be deemed subject to the provisions of and to be registered under this Ordinance, and may be transferred, mortgaged, and dealt with for all the purposes and in like manner (but subject always to the provisions of the Land Ordinance 1911) as if it had been granted by a registered proprietor of land under this Ordinance and registered in the register book in the ordinary way, excepting only that every transfer of a Crown lease shall be made by separate instrument and not by endorsement, and that any entries which ordinarily would require to be made in the register book shall be made in the register of Crown leases and on the folio constituted by the Crown lease.

33. The registrar, upon notification appearing in the Gazette that a Crown lease has been declared forfeited by the Lieutenant-Governor, shall make an entry to that effect in the register of Crown leases, and such forfeiture shall thereupon have effect.

. . . .

[40: S. A. 1886, s. 111, Aust. Torr. Syst. 359.
42: S. A. 1886, s. 119, Aust. Torr. Syst. 360.
43. N. S. W. 1900, s. 54, Aust. Torr. Syst. 111.
45: S. A. 1886, s. 126, Aust. Torr. Syst. 362.
53: Q. 1861, s. 61, Aust. Torr. Syst. 195, adding:
(3) Any amount paid by such occupier or tenant to the mortgagee or incumbrancee, or realized by distress as aforesaid, shall be deemed pro tanto a satisfaction of the said rent.
96: S. A. 1886, s. 190, Aust. Torr. Syst. 378.]

. . .

98. (1) An executor or administrator, with or without the will annexed, of a deceased registered proprietor, or the curator of intestate estates where the Court shall make an order authorizing the curator to administer the estate of a deceased registered proprietor, may apply in writing to the registrar to be registered as proprietor of any estate of freehold in the land of any such deceased registered proprietor.

(2) Such applicant shall deposit with the registrar the certificate of the death, together with the probate of the will of the deceased

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proprietor, or letters of administration of his estate, or order of the Court authorizing the curator of intestate estates to administer as aforesaid, or an office copy of the probate, letters of administration, or order, as the case may be.

(3) The registrar may, if he thinks fit, dispense with such certificate of death on production of such other evideuce of death as appears to him sufficient.

(4) Such application shall state the estate or interest in such land claimed by the applicant, and the nature of every estate or interest held by other persons at law or in equity in such land within the applicant's knowledge, and that he verily believes himself to be entitled to the estate or interest in such land in respect of which he applies to be registered; and the statement made in such application shall be verified by the statutory declaration of such applicant.

(5) The applicant shall produce the existing grant, or certificate or other instrument of title of the land in respect to which he applies to be registered, prior to his being entered in the register book as hereinafter mentioned, unless the production of such grant, or certificate, or other instrument of title be duly dispensed with.

[99, 100: N. S. W. 1900, ss. 95 (omitting sub. s. 6), 96, Aust. Torr. Syst. 130, 131.

101-103: S. A. 1886, ss. 181-183, substituting "curator of intestate estates" for "public trustee," Aust. Torr. Syst. 376.]

. . .

126A [1914, s. 2]. (1) When any lease has been granted by the Lieutenant-Governor under the provisions of any Ordinance relating to land now at or any time heretofore in force in the Territory, and has been executed by the Lieutenant-Governor but has not been executed by the lessee to whom the same was granted, the registrar may upon the application of the commissioner of lands register the lease, either forthwith or at the expiration of some defined period of time, and may cause such advertisements to be published in the Gazette as he may deem necessary.

(2) Upon such registration the lease shall for all purposes be deemed to have been duly executed by the lessee.

(3) The registrar shall endorse a memorial on the lease, to the effect that the lease was registered though unexecuted by the lessee in pursuance of this section.

[126B [1914, s. 2]: S. A. 1886, s. 247, Aust. Torr. Syst. 396.]

. . . . . .

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NEW ZEALAND.

LAND TRANSFER ACT 1915

(1915 No. 35).

[*1st October, 1915.*]

NOTE.—The statutes (1885, &c.) printed in Aust. Torr. Syst. 261 *et seq.*, were in 1908 repealed and replaced by a consolidating statute—the Land Transfer Act 1908. This and an amending statute of 1913 have now in turn been repealed and replaced by what is in effect another consolidating statute. The method of legislation has been peculiar; a "compiling" Act has been passed, with the "compiled" Act as an appendix. Both Acts have the same full title, and their interrelation can only be understood by reading them together. The text of the "compiling" Act is therefore printed in full, Appendix B—the "compiled" Act and working registration statute—being printed as to the greater part only, and treated on the same plan as the Victorian statute *ante*, p. 402.

1915, No. 35.

An Act compiling the Land Transfer Act 1908, and its Amendments.

[*1st October, 1915.*]

WHEREAS by resolution, passed by both Houses of the General Assembly on the fourteenth day of July, 1915, it was resolved that the Land Transfer Act 1908, and its amendments, should be compiled under the provisions of the Statutes Compilation Act 1908, and that effect be given to such resolution and the compilation be enacted during the present session of Parliament: And whereas the compiled Act set forth in Appendix B hereto has been certified under the hand of the solicitor-general as being a true and correct compilation of the enactments specified in Appendix A hereto: Be it therefore enacted by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Land Transfer Acts Compilation Act 1915.

2. The enactments specified in Appendix A hereto are hereby repealed, and in lieu thereof the compiled Act set forth in Appendix B hereto is hereby enacted, under the title of the Land Transfer Act 1915.

3. In the construction of the compiled Act the Acts hereby repealed shall be deemed to have been repealed by the compiled Act, and such compiled Act shall, from the passing of this Act, and until other provision is made, unless a contrary intention appears, apply to the persons, things, and circumstances appointed or created by and existing or continuing under the Acts hereby repealed, as if the same had been appointed or created or were existing under the compiled Act: provided that in the case of any mortgage executed prior to the first day of January, 1903 (being the date of the coming into operation of the Land Transfer Amendment Act 1902), the provisions of the Acts in force on the commencement of the Land Transfer Act 1908, in respect

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to that mortgage shall continue to apply to such mortgage, in so far as those provisions conflict with the provisions of the compiled Act: provided also that in the case of any sub-mortgage executed prior to the first day of March, 1914 (being the date of the coming into operation of the Land Transfer Amendment Act 1913), the provisions of the Acts in force when that sub-mortgage was registered shall continue to apply to such sub-mortgage, in so far as those provisions conflict with the provisions of the compiled Act.

APPENDIX A.

ACTS REPEALED.

1908, No. 99.—The Land Transfer Act 1908.
1913, No. 17.—The Land Transfer Amendment Act 1913.

APPENDIX B.

LAND TRANSFER.

. . . . . .

An Act compiling the Land Transfer Act 1908, and its Amendments.

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. (1) This Act may be cited as the Land Transfer Act 1915.

(2) The Property Law Act 1908 shall, as regards land under this Act, be read and construed so as not to conflict with the provisions of this Act.

2. In this Act, and in all instruments purporting to be made and executed under this Act, if not inconsistent with the context,—

"Bankruptcy" means the vesting in any person or persons of any estate or interest of a debtor for the benefit of creditors generally, by deed of arrangement or otherwise, under authority of any court of competent jurisdiction:

"Crown grant" means the grant of any land by the Crown, and includes certificates of title issued in lieu of grant:

"Dealing" means and includes every transfer, transmission, mortgage, lease, or incumbrance of any estate or interest under this Act:

"District" means a land registration district under this Act:

"Estate or interest" means and includes every estate in land, also any mortgage or charge on land under this Act:

"Former Land Transfer Act" means the Land Transfer Act 1908, and the Land Transfer Act 1885, and all amendments of either of those Acts, and includes every Act repealed by those Acts:

"Endorsement," in addition to its ordinary meaning, includes anything written upon or at the foot of any document for giving effect to any of the purposes of this Act:

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"Instrument" means and includes any printed or written document, map, or plan relating to the transfer of or other dealing with land, or evidencing title thereto:

"Land" extends to and includes messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description, and every estate or interest therein, together with all paths, passages, ways, waters, watercourses, liberties, easements, and privileges thereunto appertaining, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder lying or being, unless specially excepted:

"Land Revenue Receiver's receipt" includes any document, signed by competent authority, evidencing a contract for alienation of land by the Crown in fee simple:

"Mortgage" means and includes any charge on land created under the provisions of this Act for securing—

(*a*) The repayment of a loan, or satisfaction of an existing debt;

(*b*) The repayment of future advances, or payment or satisfaction of any future or unascertained debt or liability, contingent or otherwise;

(*c*) The payment to the holders for the time being of any bonds, debentures, promissory notes, or other securities, negotiable or otherwise, made or issued by the mortgagor before or after the creation of such charge;

(*d*) The payment to any person or persons by yearly or periodical payments or otherwise of any annuity, rentcharge, or sum of money other than a debt:

"Mortgagee" means the proprietor of a mortgage:

"Mortgagor" means the proprietor of any estate or interest charged with a mortgage:

"Proprietor" means any person seised or possessed of any estate or interest in land, at law or in equity, in possession or expectancy:

"Registrar" and "Examiner" mean respectively the district land registrar and examiner of titles of the district within which any land to be dealt with or affected is situated:

"Registrar-General" means the registrar-general of land appointed under this Act:

"Surveyor-General" means the person holding office with that title under the Land Act 1908, or otherwise:

"The Land Transfer Acts" means this Act, and includes any former Land Transfer Act:

"Transmission" means the acquirement of title to an estate or interest consequent on the death or bankruptcy of a registered proprietor, or as his executor or administrator, or as trustee under a will or settlement, or by virtue of appointment or succession to any office.

Districts, Officers, &c.

[3-9: N. Z. 1885, ss. 3-9, Aust. Torr. Syst. 263,264.]

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Land subject to provisions of this Act.

10. The following land shall be subject to the provisions of this Act:—

(*a*) All land which has already in any manner become subject to the provisions of any former Land Transfer Act:

(*b*) All land hereafter alienated or contracted to be alienated from the Crown in fee:

(*c*) All land in respect of which any order is hereafter made, under the provisions of any Native Land Act in force for the time being, which has the effect of vesting such land in any person in freehold tenure:

(*d*) All land which hereafter becomes vested in any person for an estate in fee simple in possession by virtue of any Act of the General Assembly.

11. Land over which the native title has been extinguished since the constitution of the district within which the same is situate, but prior to the thirty-first day of August, 1874, shall come under the provisions of this Act upon the registration of a Crown grant, or certificate of title in lieu of grant.

Title in substitution for Crown grant.

12. No Crown grant shall be issued for any land subject to the provisions hereof; but in lieu of such grant the Governor shall, by warrant under his hand, direct the registrar to issue a certificate of title for such land in the form in the first schedule hereto; and every such certificate, when signed and registered, shall have the force and effect of a Crown grant.

13. Every such warrant—

(*a*) Shall specify the name and description of the person or persons entitled to such grant, and, if more than one, whether as joint tenants or tenants in common, and the date whereon the right to such grant accrued, together with a description of the land sufficient to identify the same the correctness of which shall be certified by the surveyor-general, or by some person appointed by him for the purpose; and whether such land is intended to be held in trust as a public reserve or otherwise, or is subject to any road or other reservation or restriction; and

(*b*) Shall be filed by the registrar in his office for reference, and shall be conclusive evidence to the registrar of the matters hereby required to be therein stated.

14. If it appears on the provisional register that the estate of any person named in any warrant as entitled to a Crown grant has become vested in any other person, claiming through the person named in the warrant, the registrar may issue a certificate of title direct to the person appearing to be so entitled.

15. Every certificate of title to be issued as aforesaid shall be made subject to all incumbrances, estates, and interests appearing on the provisional register as affecting the land at the date of the issue of such certificate.

16. No warrant shall be necessary for the issue of a certificate of title to any person in whom any land has become and is, or hereafter

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becomes, vested for an estate in fee simple in possession by any Act of the General Assembly, or by any proclamation or order in Council under the express provisions of any such Act since the first day of March, 1871.

17. (1) The land comprised in any certificate of title issued, or hereafter to be issued, in lieu of a Crown grant shall be deemed to have been subject to the provisions of the Land Transfer Acts as from the date fixed by the Governor's warrant as the date of acquisition of title thereto; and such date shall, for all purposes whatsoever, be deemed the antevesting date, in the same manner as if such antevesting date had been inserted in a Crown grant of the said land.

(2) The reference to such antevesting date, in any certificate of title purporting to be issued in pursuance of such warrant, shall be conclusive evidence of such date, and that the same was fixed by the Governor's warrant, as in such certificate is set forth and stated.

(3) This section shall not be construed to validate or enable the registration under the Land Transfer Acts of any instrument executed prior to the sixteenth day of September, 1889 (being the date of the coming into operation of the Land Transfer Act 1885 Amendment Act 1889), by any aboriginal native owner, so far as such instrument was not valid or capable of registration prior to that date.

18. (1) The reservation in any such warrant (whether heretofore or hereafter issued) of any right of road, or right to take or lay off any road, shall, as from the date of such warrant, have the like effect as if such reservation had been contained in a Crown grant on the like date of the land the subject thereof.

(2) Such reservation, and all rights existing by virtue thereof, shall be deemed sufficiently protected by the general reservation in any certificate of title of the right of the Crown to take and lay off roads under the provisions of any Act of the General Assembly, and no certificate of title shall be impeached on the ground of uncertainty or otherwise, on account of any such reservation therein contained.

Applications to bring land under Act.

19. Land which has not become subject to this Act in any manner under the foregoing provisions may, if the same has been alienated or contracted to be alienated from the Crown in fee, be brought under the operation hereof, in manner hereinafter provided; but no application shall be received to bring under this Act land for which no Crown grant has been issued, until such application has been approved by the surveyor-general, or by some person appointed by him for the purpose, and has been assented to by the Governor.

20. (1) The registrar of each district shall receive applications for the purpose aforesaid in the form A in the second schedule hereto, if made by any of the following persons, that is to say:—

(*a*) By any person (claiming to be the person) in whom the fee simple of the land is vested in possession, either at law or in equity: provided that, wherever trustees other than trustees of public reserves have no express power to sell the land which they seek to bring under this Act, the person claiming to be beneficially entitled to such land shall concur in such application:

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(*b*) By any person claiming a life estate in possession, not being a lease for a life or lives: provided that all persons claiming to be beneficially entitled in reversion or remainder shall concur in such application:

(*c*) By any person having power legally or equitably to dispose of the fee simple in possession, but if subject to the consent of any other person, then with such consent:

(*d*) By any person or body corporate holding any land as a public reserve, but in such case subject to the trusts affecting such reserve:

(*e*) By the guardian of any infant, or the committee or guardian of any lunatic or person of unsound mind, making such application in the name of such infant, lunatic, or person of unsound mind:

(*f*) By any agent holding a power of attorney authorizing the sale of a freehold estate in any land of an absent proprietor, and making such application in the name of such proprietor, unless such power expressly prohibits his so doing.

(2) But no application shall be received—

(*g*) From any person claiming to be entitled to an undivided share of any land, unless the persons who appear to be entitled to the other undivided shares of the said land join in such application with a view to bringing the entirety under this Act; nor

(*h*) From the mortgagor of any land, unless the mortgagee consents to such application; nor

(*i*) From the mortgagee of any land, except in exercise of a power of sale contained in the mortgage.

21. Every applicant shall, when making his application, surrender to the registrar all instruments in his possession or under his control, constituting or in any way affecting his title, and shall furnish a schedule of such instruments, and also, if required, an abstract of his title, and shall make and subscribe a declaration of the truth of the statements in such application, and shall append to such application a plan of the land applied for, showing the boundaries and relative position thereof.

[22-26: N. Z. 1885, ss. 20-24, Aust. Torr. Syst, 267, 268.]

27. If, at the expiration of the time limited in respect of any application as aforesaid, it appears to the registrar and examiner that all necessary notices have been given, and that no caveat has been lodged, and if no sufficient cause to the contrary otherwise appears, the registrar shall proceed to bring the land described in such application under this Act, by issuing to the applicant, or to such person as he by writing under his hand directs, a certificate of title in the form B aforesaid.

28. If however it appears to the registrar and examiner, at the expiration of the time limited as aforesaid, that there has been a failure in the service of any notice, and that such service is essential, the registrar and examiner may either reject the application, or may limit and appoint a further time within which caveat may be lodged as aforesaid, and upon the expiration of such term, and upon proof

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of service of such notice may, if no caveat has been lodged, bring the land under this Act by issuing a certificate in manner aforesaid.

29. The applicant may, with the consent of the person (if any) in whose name the certificate of title has been directed to be issued, withdraw his application at any time prior to the issuing of the certificate; and the registrar shall in such case return to him, or to the person (if any) notified in such application as having a lien thereon, all instruments of title deposited by such applicant in support of his application.

30. (1) Upon issuing a certificate of title bringing land under this Act, the registrar shall cancel by stamp or otherwise the conveyance or other instrument through which the applicant derives his title; but if such instrument relates to or includes any property other than the land included in such certificate of title, the registrar shall, by endorsement thereon, cancel the same in so far only as relates to the land included in such certificate, and such instrument shall for all other purposes remain in full force and effect.

(2) All instruments of title relating exclusively to the land shall be retained by the registrar, and no person shall be entitled to the production thereof except upon the written order of the applicant, or of some person claiming through or under him, or upon the order of the Supreme Court or a judge thereof.

31. The reversion expectant upon any lease shall not be deemed to have been extinguished in consequence of the land whereof such lease has been granted having been brought under this Act, and the person appearing upon the register as seised of the land described in such lease shall be held in every court of law and equity to be seised of the reversion expectant upon any such lease, and to have all powers, rights, and remedies to which a reversioner is by law entitled, and shall be subject to all covenants and conditions therein expressed to be performed on the part of the lessor.

32. It shall not be necessary for any registrar of deeds to register any Crown grant that may be transmitted to him for registration under the Deeds Registration Act 1908, pending an application to bring the land comprised therein under this Act.

Registration.

33. Each registrar shall keep a book to be called the "register," and shall bind up therein duplicates of all grants of land, and of all certificates of title to land within his district, and each grant and certificate of title shall constitute a separate folium of such register, and the registrar shall record thereon the particulars of all instruments, dealings, and other matters by this Act required to be registered or entered on the register, affecting the land included under each such grant or certificate of title, distinct and apart.

34. (1) Every grant and certificate of title shall be deemed and taken to be registered under the provisions and for the purposes of this Act, so soon as the same have been marked by the registrar with the folium and volume as embodied in the register.

(2) Every memorandum of transfer, or other instrument purporting to transfer or in any way to affect land under the provisions of this Act, shall be deemed to be so registered, so soon as a memorial thereof as hereinafter described has been entered in the register upon the

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folium constituted by the existing grant or certificate of title of such land.

(3) The person named in any grant, certificate of title, or other instrument so registered, as seised of or taking any estate or interest, shall be deemed to be the registered proprietor thereof.

35. (1) Every instrument presented for registration shall (except in the case of a memorandum of transfer) be in duplicate, or if the person presenting the same so requires, in triplicate, and shall be attested by a witness.

(2) In the case of an instrument registered in triplicate, one part shall be marked "triplicate," and it shall not be necessary to record on that part any memorial as provided by section 37 of this Act.

(3) Every instrument shall be registered in the order of time in which the same is presented for that purpose.

(4) Instruments registered in respect to or affecting the same estate or interest shall, notwithstanding any express, implied, or constructive notice, be entitled in priority the one over the other according to the date of registration, and not according to the date of each instrument itself.

(5) On registration thereof the registrar shall file the same or one part thereof (if in duplicate or triplicate) in his office, and deliver the other or others (if any) to the person presenting the same for registration.

(6) So soon as registered every instrument drawn in any of the forms provided in the schedules to this Act, or in any form which for the same purpose may be authorized in conformity with the provisions of this Act, shall, for the purposes of this Act, be deemed and taken to be embodied in the register as part and parcel thereof.

(7) Such instrument, when so constructively embodied and stamped with the seal of the registrar, shall have the effect of a deed duly executed by the parties signing the same.

36. Every memorial entered in the register shall state the nature of the instrument to which it relates, the day and hour of the production of such instrument for registration, and the names of the parties thereto, and shall refer by number or symbol to such instrument, and shall be signed by the registrar.

37. (1) Whenever a memorial of any instrument has been entered in the register, the registrar shall (except in the case of transfer or other dealing endorsed upon a memorandum of lease or mortgage, as hereinafter provided) record the like memorial on the duplicate grant, certificate of title, lease, or other instrument evidencing title to the estate or interest intended to be dealt with or in any way affected, unless the registrar, as hereinafter provided, dispenses with the production of the same.

(2) The registrar shall endorse on every instrument so registered a certificate of the date and hour on which the said memorial was entered in the register, and shall anthenticate each such certificate by signing his name and affixing his seal thereto.

(3) Such certificate shall be received in all courts as conclusive evidence that such instrument has been duly registered.

[38: V. 1915, s. 61, *ante* p. 411.]

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39. No registrar shall register any instrument purporting to transfer, or otherwise to deal with or affect, any estate or interest in land under the provisions of this Act, except in the manner herein provided, nor unless such instrument is in accordance with the provisions hereof.

40. (1) The registrar and examiner, in case they see reasonable cause for so doing, may dispense with the production of any grant, certificate of title, lease, or other instrument for the purpose of entering the memorial by this Act required to be entered upon the transfer or other dealing with land within his district and under the provisions of this Act.

(2) Where such production has been dispensed with as aforesaid, then upon the registration of such transfer or other dealing, the registrar shall notify in the memorial in the register-book of his district that no entry of such memorial has been made on the duplicate grant or other instrument, and such transfer or other dealing shall thereupon be as valid and effectual as if such memorial had been so entered: provided always that before registering such transfer or other dealing the registrar shall give at least fourteen days' notice of his intention to register such dealing, in the Gazette and in at least one newspaper published in the district.

41. The registrar, upon payment of the prescribed fee, shall furnish to any person applying for the same a certified copy of any registered instrument affecting land within his district, and every such certified copy signed by him, and sealed with his seal, shall be received in evidence for all purposes for which the original instrument might be put in evidence.

42. Any person may, upon payment of the prescribed fee, have access to the register for the purpose of inspection, during the hours and upon the days appointed by regulation under this Act.

43. No registrar shall register any instrument liable to stamp duty unless the same purports to have been duly stamped, but no registration shall be invalidated by reason of any error in this respect.

44. (1) Where, by an alteration heretofore or hereafter made in the boundaries of any registration district, any land formerly comprised therein becomes or heretofore has become included in any other district, all such copies of the registers of the first-mentioned district as by the registrar thereof have been or hereafter may be deposited with and accepted by the registrar of such other district, shall for all the purposes of the Land Transfer Acts have and be deemed to have had the force and effect of the original registers, and shall, as regards the lands affected by the alteration of boundaries, be deemed to be the original registers and be admissible in evidence as such.

(2) This section shall extend to validate all entries heretofore made, and all matters and things heretofore done, which if made or done after the coming into operation of this Act would be valid and effectual.

(3) For the purposes of this section "registers" includes all registers, record-books, indices, and books of reference required to be kept under the Land Transfer Acts, or by any regulations thereunder.

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District Agents.

45. There may from time to time be appointed in and for each district fit and proper persons as district agents, who may receive and transmit to the registrar for registration any instruments the registrar is required or empowered to register; and may also, on registration of any instrument, receive the same from the registrar on behalf of the persons entitled to possession thereof.

(2) Instruments forwarded for registration through a district agent shall, as between themselves, be entitled to registration in the order in which they are lodged with the agent; but, as against all other instruments, shall be entitled to priority according to the time of actual reception by the registrar.

(3) The Governor in Council may from time to time prescribe fees to be taken under this section, and make such regulations with regard to the matters aforesaid as may be necessary or expedient.

Provisional registration—Lost title-deeds.

[46-53: N. Z. 1885, ss. 42-49, Aust. Torr. Syst. 272-274.]

Outstanding interests.

54. Leases, mortgages, incumbrances, or other estates or interests affecting the estate of the proprietor at the time of bringing land under this Act (hereinafter called "outstanding interests"), shall, so far as the same are disclosed in the application or can otherwise be ascertained, be notified on the register in such manner as to preserve their priority, and shall thereafter, notwithstanding variation in form, be dealt with as if the same or corresponding interests had been originally created under this Act, and every dealing therewith shall imply all powers, conditions, and covenants incident to dealings in the like form with land under this Act.

55. (1) Estates and interests existing by virtue of instruments registered under the Deeds Registration Act 1908, affecting land over which the native title has been extinguished since the constitution of the district within which such land is situate, shall be deemed "outstanding interests" within the meaning of this Act, and shall be noted accordingly.

(2) No such estates or interests shall be so recognized if created prior to the antevesting date in the grant, or subsequent to the thirty-first day of August, 1874.

56. No person claiming any estate or interest by virtue of any deed or instrument, which might have been registered against the land under any Act for the time being in force for the registration of deeds within New Zealand, shall have any claim or action against the registrar-general or upon the assurance fund by reason of deprivation of such estate or interest consequent on bringing the land under this Act, unless such deed or instrument has been so registered, or unless the registrar has been served personally with notice in writing of such claim, or has had actual personal knowledge thereof and has omitted to recognize the same.

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Registered proprietors.

57. Subject to any Act of the General Assembly for the time being in force relating to the tenure of land by persons of the native race, any two or more persons named in any Crown grant, or in any instrument executed under this Act, as transferees, mortgagees, or proprietors of any estate or interest shall, unless the contrary is expressed, be deemed to be entitled as joint tenants with right of survivorship, and such instrument, when registered, shall take effect accordingly.

58. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such incumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of such land, but absolutely free from all other incumbrances, liens, estates, or interests whatsoever—

(*a*) Except the estate or interest of a proprietor claiming the same land under a prior certificate of title, or under a prior grant registered under the provisions of this Act; and

(*b*) Except so far as regards the omission or misdescription of any right of way or other easement, created in or existing upon any land; and

(*c*) Except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of such registered proprietor, by wrong description of parcels or of boundaries.

[59: V. 1915, s. 244, *ante* p. 454, omitting reference to "annuitant"; under N. Z. 1915, s. 2 (*ante* p. 476), "mortgagee" includes "annuitant."]

60. After land has become subject to this Act, no title thereto, or to any right, privilege, or easement in, upon, or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the registered proprietor.

Certificate of Title.

61. (1) Every registered proprietor of an estate of freehold in possession in land under this Act shall be entitled to a certificate of title for the same, in the Form B in the second schedule hereto, or as near thereto as the nature of the interest will permit.

(2) No certificate of title shall issue for any undefined interest.

62. The registrar shall note upon such certificate, in such manner as to preserve their priority, the memorials of all unsatisfied mortgages, leases, and other estates and interests outstanding or otherwise, to which the land is subject at the time of issuing such certificate; and in case of a certificate issued to a minor, or person under other legal disability, the registrar shall, in such certificate, state the particulars of such disability, so far as he has notice or knowledge thereof.

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63. (1) Every certificate issued pursuant to any dealing under this Act shall bear even date with the registration of such dealing, unless such dealing has been originally entered on the provisional register, in which case the certificate shall bear even date with the registration of the Crown grant, or with the date of reception by the registrar of the Governor's warrant for issue of a certificate in lieu of grant, as the case may be.

(2) A certificate of title issued in the name of a registered proprietor in lieu of a cancelled certificate may be expressed to take effect as from the date of the certificate originally issued to such proprietor in respect of the same estate or interest.

64. Whenever any easement or incorporeal right, other than an annuity or rent-charge in or over any land under this Act, is created for the purpose of being annexed to, or used and enjoyed together with, other land under this Act, the registrar shall enter a memorial of the instrument creating such easement or incorporeal right upon the grant or certificate of title of such other land, and such memorial shall, as from the date of entry thereof, have the effect of including such easement in such grant or certificate of title, as appurtenant to the land therein described.

65. When two or more persons are entitled as tenants in common to undivided shares in any land, each such person shall be entitled to receive a separate certificate for his undivided share: provided that tenants in common shall not be bound to take separate certificates, unless and until they require to make separate dealings with their respective interests.

66. The registrar shall not be bound to issue a certificate of title upon any application in respect of which notice is hereby required to be given by advertisement, until after the expiration of fourteen days from the time limited in such advertisement.

67. If any certificate, whether on the first bringing of land under this Act or otherwise, is issued in the name of a person who has previously died, such certificate shall not be void, but the land comprised therein shall devolve in like manner as if such certificate had been issued immediately prior to such death.

68. Every certificate of title duly authenticated under the hand and seal of the registrar shall be received in all courts of law and equity as evidence of the particulars therein set forth or endorsed thereon, and of their being entered in the register, and shall, unless the contrary is proved by production of the register or a certified copy thereof, be conclusive evidence that the person named in such certificate of title, or in any entry thereon, as seised of or as taking estate or interest in the land therein described, is seised or possessed of such land for the estate or interest therein specified, as from the date of such certificate or as from the date from which the same is expressed to take effect, and that the property comprised in such certificate has been duly brought under this Act.

69. (1) No instrument purporting to deal with any land, estate, or interest under this Act shall be, or be deemed to have been, invalid or ineffectual by reason only that the same may purport to have been executed at a time when the person executing the same was not actually registered as the proprietor of such land, estate, or interest.

(2) Sub-section three of section 17 hereof shall extend and apply to this section.

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70. No right to any public road or reserve shall be acquired, or be deemed to have been acquired, by the unauthorized inclusion thereof in any certificate of title, or by the registration of any instrument purporting to deal therewith otherwise than as authorized by law.

71. No certificate of title shall be impeached or defeasible on the ground of want of notice, or of insufficient notice, of the application to bring the land therein described under this Act, or on account of any error, omission, or informality in such application or in the proceeding pursuant thereto.

72. Any certificate of title issued upon the first bringing of land under this Act, whether upon application or by force of any statute or of the order of any court, and every certificate of title issued in respect of the same land, or any part thereof, to any person claiming or deriving title under or through the first registered proprietor, shall be void as against the title of any person adversely in actual occupation of and rightfully entitled to such land, or any part thereof, at the time when such land was so brought under this Act, and continuing in such occupation at the time of any subsequent certificate of title being issued in respect of the said land; but every such certificate shall be as valid and effectual against the title of any other person as if such adverse occupation did not exist.

73. The registrar may, upon such evidence as appears to him sufficient, subject to any regulations under this Act, correct errors and supply omissions in certificates of title or in the register, or in any entry therein, and may call in any outstanding instrument of title for that purpose.

[74-77: V. 1915, ss. 80, 81, *ante* p. 414.]

78. Upon the recovery of any land, estate, or interest by any proceeding in any court from the person registered as proprietor thereof, the court or judge, in any case in which such proceeding is not expressly barred, may direct the registrar to cancel any certificate of title or other instrument, or any entry or memorial in the register relating to such land, and to substitute such certificate of title or entry as the circumstances of the case require, and the registrar shall give effect to such order accordingly.

79. (1) Upon the application of any registered proprietor of land held under separate grants or certificates of title, or under one grant or certificate, the registrar may issue to such proprietor a single certificate of title for the whole of such land, or several certificates, each containing portion of such land, so far as the same may be done consistently with any regulations for the time being in force.

(2) Upon issuing any such certificate the registrar shall cancel the grant or previous certificate, and shall note thereupon a reference to the certificate of title issued in lieu thereof.

80. (1) In the event of any grant or certificate of title being lost, mislaid, or destroyed, the registered proprietor, together with other persons (if any) having knowledge of the circumstances, may make a statutory declaration stating the facts of the case, the names and descriptions of the registered owners, and the particulars of all mortgages, incumbrances, or other matters affecting such land and the title thereto, to the best of the declarant's knowledge and belief.

(2) The registrar, if satisfied as to the truth of such declaration, may issue a provisional certificate of title, which provisional certifi-

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cate shall contain an exact copy of the original grant or certificate and of every memorandum and endorsement thereon, and shall also contain a statement of the circumstances under which such provisional certificate is issued.

(3) The registrar shall at the same time enter in the register notice of the issuing of such provisional certificate and the date thereof, and the circumstances under which it was issued.

(4) The registrar before issuing such provisional certificate shall give at least fourteen days' notice of his intention so to do in the Gazette, and in at least one newspaper published in New Zealand.

(5) Such provisional certificate shall be available for all purposes and uses for which the grant or certificate of title so lost or mislaid would have been available, and as valid to all intents as such lost grant or certificate.

81. Where a transfer has, under section 75 of the Rating Act 1908, been registered without production of the outstanding certificate of title, the registrar may, if he is satisfied that such outstanding certificate cannot be got in and cancelled, issue a new certificate in the name of the purchaser without such cancellation, and for that purpose may cancel the existing folium of the register.

Transfers.

82. (1) When land under this Act, or any estate or interest therein, is intended to be transferred, or any right of way or other easement is intended to be created, the registered proprietor may execute for the purpose of registration a memorandum of transfer in the form C in the second schedule hereto, which memorandum shall, for description of the land intended to be dealt with, refer to the proper folium of the register, with such further description as may be necessary, and shall contain a precise statement of the estate or interest intended to be transferred or created.

(2) The registrar may, at his discretion, dispense with the requirements of this section as to the mode of description of the land, estate, or interest intended to be dealt with, if he is satisfied that the description given is sufficient to identify such land, estate, or interest.

83. If any memorandum of transfer purports to transfer the whole of the land described in a grant or certificate of title, for all the estate and interest therein of any registered proprietor, it shall not be necessary for the registrar to cancel such grant or certificate; but the memorial of such transfer, endorsed on such grant or certificate, shall be as good evidence that the transferee named in such memorial is seised of all the estate and interest in the said land of the person whose interest is expressed to be transferred, subject as in such grant or certificate mentioned or thereon endorsed, as if a certificate of title had been issued for the same in the name of the transferee.

84. If the transfer purports to transfer an estate of freehold in possession, not being a lease for a life or lives, in part of the land described in any grant or certificate, the transferor shall surrender such grant or certificate to the registrar and the endorsement thereon by the registrar of a memorial of such transfer shall have the effect of cancelling such grant or certificate, so far as relates to the land transferred.

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85. The registrar, upon cancelling any grant or certificate by endorsement as aforesaid, shall issue to the transferee a certificate of title to the land transferred, and shall retain the partially cancelled grant or certificate, and when required by any person entitled thereto, shall issue to such person a certificate of title for the untransferred balance of the land, or for any portion thereof.

86. (1) When any certificate of title is partially cancelled by endorsement thereon of a memorial of transfer of a portion of the land, the registrar may, at his discretion, allow the person entitled to the untransferred balance of the land to retain such certificate, and the same shall, as to such untransferred balance, remain in full force and virtue; provided that the memorial shall clearly define what portion of the land has been transferred.

(2) In the case of a transfer of a road-line to his Majesty, the registrar may mark such road-line upon the plan on the certificate, or upon a new plan upon the certificate, and endorse a description of such road-line upon the said certificate; and in any such case it shall not be necessary to issue a certificate for such road-line, but the old certificate, or a new one, may be reissued without fee with such road-line marked thereon, with a memorandum that such transfer has been registered.

87. (1) The registered proprietor of land under this Act—

(*a*) May transfer such land to his wife; or

(*b*) If a married woman, may make such transfer to her husband; or

(*c*) May make a transfer to himself jointly with any other person or persons; and

(*d*) Create or execute any powers of appointment, or limit any estates, whether by remainder or in reversion, and whether contingent or otherwise, and for that purpose may modify or alter any form of transfer hereby prescribed.

(2) In case of the limitation of successive interests as aforesaid, the registrar shall cancel the grant or certificate evidencing the title of the transferor, and shall issue a certificate in the name of the person entitled to the freehold estate in possession for such estate as he is entitled to, and the persons successively entitled in reversion or remainder shall be entitled to be registered by virtue of the limitations in their favour in such instrument expressed, and each such person upon his estate becoming vested in possession shall be entitled to a certificate of title for the same.

88. In every transfer of land subject to a mortgage, there shall be implied a covenant on the part of the transferee to and with the transferor, to pay the interest or other payments thereafter to become due by virtue of such mortgage, at the time and in manner therein specified for payment thereof, and to pay the principal sum when and as the same becomes due, and to keep harmless and indemnified the transferor in respect of such payments, and in respect of all liability on account of the future observance of the covenants and conditions on the part of the transferor in such mortgage expressed or implied.

89. (1) A registered mortgage or lease may be transferred by memorandum of transfer as aforesaid, or by an instrument in the form H in the second schedule hereto, which instrument may be endorsed upon the memorandum of mortgage or lease.

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(2) Upon such memorandum of transfer or other instrument being registered, the estate or interest of the transferor as set forth in such instrument, with all rights, powers, and privileges thereto belonging or appertaining, shall pass to the transferee.

90. Such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if named in such instrument originally as mortgagee or lessee of such land, estate or interest; and by virtue of every such transfer as is hereinbefore mentioned, the right to sue upon any memorandum of mortgage or other instrument, and to recover any debt, sum of money, annuity, or damages thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity, or damages shall be transferred, so as to vest the same at law as well as in equity in the transferee thereof: provided always that nothing herein contained shall prevent a court of competent jurisdiction from giving effect to any trusts affecting the said debt, sum of money, annuity or damages, in case the transferee holds the same as a trustee for any other person.

91. In every transfer of a lease as aforesaid there shall be implied a covenant, by and on the part of the transferee with the transferor, that the transferee will thenceforth pay the rent by the said lease reserved, and observe and perform all the covenants in the said lease expressed or implied on the part of the lessee to be observed and performed; and will indemnify and keep harmless the transferor and his representatives from and against all actions, suits, claims, and expenses in respect of the non-payment of such rent, or the breach or non-observance or non-performance of such covenants, or any of them.

92. Whenever any order is made by any court of competent jurisdiction, vesting any estate or interest under this Act in any person, the registrar, upon being served with an office copy of such order, shall enter a memorandum thereof in the register and on the outstanding instrument of title, and until such entry is made the said order shall have no effect in vesting or transferring the said estate or interest.

Leases.

93. (1) When any land under this Act is intended to be leased or demised for a life or lives, or for any term not less than three years, the proprietor shall execute a memorandum of lease in the form D in the second schedule hereto, and such instrument shall, for the description of the land intended to be dealt with, refer to the grant or certificate of title, or shall give such other description as may be necessary.

(2) A memorandum of lease executed in the said form D may be registered, notwithstanding that the term thereof is less than three years, but no lease or agreement for lease for a less period than three years shall be void, by reason only of such memorandum not having been executed or registered.

94. A right for or covenant by the lessee to purchase the land may be stipulated in a memorandum of lease; and in case the lessee pays the purchase-money, and otherwise observes his covenants expressed and implied in such instrument, the lessor shall be bound to execute a memorandum of transfer, and to perform all other necessary acts.

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for the purpose of transferring to the lessee the said lands and the fee simple thereof.

95. No lease of mortgaged or incumbered land shall be binding upon the mortgagee, except so far as such mortgagee has consented thereto.

96. (1) The surrender of a lease by agreement between the parties may be effected by endorsing thereon the word "surrendered"; and such endorsement, if signed by all necessary parties and attested, shall be noted on the register and on the outstanding certificate of title, and shall thereupon operate to vest all the estate and interest of the lessee in the person entitled to the reversion.

(2) No lease subject to mortgage or under-lease shall be surrendered without the consent of the mortgagee or sub-lessee.

97. In every memorandum of lease there shall be implied the following covenants against the lessee, that is to say:—

(*a*) That he will pay the rent thereby reserved, at the times therein mentioned, and all rates and taxes which may be payable in respect of the demised property during the continuance of the lease:

(*b*) That he will keep and yield up the demised property in good and tenantable repair.

98. In every memorandum of lease there shall also be implied the following powers in the lessor, that is to say:—

(*a*) That he may, by himself or his agents, at all reasonable times, enter upon the demised property and view the state of repair thereof, and may serve upon the lessee, or leave at his last or usual place of abode in New Zealand, or upon the demised property, a notice in writing of any defect, requiring him, within a reasonable time to be therein prescribed, to repair the same:

(*b*) That in case the rent or any part thereof is in arrear for the space of six months, although no formal demand for payment has been made, or in case default is made in the fulfilment or observance of any covenant or condition, whether expressed or implied, in such lease on the part of the lessee, and is continued for the space of six months, or in case the repairs required by such notice as aforesaid have not been completed within the time therein specified, such lessor may re-enter upon and take possession of such demised premises.

99. (1) In case of re-entry and recovery of possession of any leasehold premises, either by process of law or by exercise of any power of re-entry in the lease contained or implied, the registrar shall, upon proof to his satisfaction of such re-entry, and of actual recovery of possession, notify such re-entry upon the register, and upon the outstanding instrument of title, if produced to him for that purpose.

(2) The estate of the lessee, and of every person claiming through or under him, shall thereupon cease and determine, but without releasing him or them from liability in respect of the breach or non-observance of any covenant or condition in such lease contained or implied.

(3) Provided that unless such re-entry and recovery of possession have been by formal process of law, the registrar shall require notice of

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application to register the same to be served on all persons interested under the lease, or failing such notice, shall give at least one calendar month's notice of such application by publication in the Gazette, and in some newspaper published in the district, before making any entry upon the register.

100. (1) The provisions of section 80 hereof shall, mutatis mutandis, apply to any memorandum of lease of which the outstanding duplicate has been lost, mislaid, or destroyed.

(2) The same provisions shall, mutatis mutandis, apply to any memorandum of lease of which the outstanding duplicate has become defaced or dilapidated and is surrendered to the registrar for cancellation, but in such case the statutory declaration referred to in sub-section one and the notices referred to in sub-section four of the said section 80 shall not be necessary.

Mortgages.

101. (1) Whenever any estate or interest under this Act is intended to be charged with or made security for payment of any money, the registered proprietor shall execute a memorandum in the form E or F in the second schedule hereto, as may be applicable to the case, and every such instrument shall contain a precise statement of the estate or interest intended to be charged, and shall, for description of the land, refer to the proper folium of the register, and shall give such other description as may be necessary.

(2) The form G in the second schedule hereto may be used in lieu of the said form E.

102. A mortgage under this Act shall have effect as security, but shall not operate as a transfer of the estate or interest so charged.

103. (1) In every mortgage under this Act there shall be implied the covenants, conditions, and powers set forth in the fourth schedule hereto, except in so far as is otherwise expressed in the mortgage.

(2) The covenant relating to insurance contained in the sixth schedule hereto shall not apply to such mortgages.

104. (1) In the case of every mortgage under this Act—

(*a*) The amount secured by the mortgage may be increased or reduced;

(*b*) The rate of interest may be increased or reduced; and

(*c*) The term of currency of the mortgage may be shortened, extended, or renewed—

by a memorandum in such one of the forms numbered (1), (2), or (3) in the fifth schedule to this Act as is applicable.

(2) The memorandum may include all or any of the matters mentioned in sub-section one hereof, and in such case the said forms shall be modified accordingly.

(3) The memorandum may be registered in like manner as the original mortgage.

(4) A memorandum or instrument, varying the terms or conditions of any mortgage of land subject to a subsequent mortgage, shall not be binding on any mortgagee, unless he has consented thereto in writing on such memorandum or instrument, but such consent shall render the said memorandum or instrument binding on the mortgagee so consenting, and shall be deemed to be notice to and shall be binding on all

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persons who may subsequently derive from him any interest in the mortgaged property.

Remedies of mortgagee.

105. The mortgagee, upon default in payment of the principal sum, interest, annuity, or rent-charge secured by any mortgage, or of any part thereof, may enter into possession of the mortgaged land by receiving the rents and profits thereof, or may bring an action for possession of the said land, either before or after entering into the receipt of the rents and profits thereof, and either before or after any sale of such land is effected under the power of sale given or implied in his mortgage.

106. Besides his remedy against the mortgagor, every mortgagee shall be entitled, after the principal sum, interest, annuity, or rent-charge, or any part thereof, has become in arrear for twenty-one days, and after seven days have elapsed from the date of application for the payment thereof to the occupier or tenant, to enter upon the mortgaged land and distrain and sell the goods and chattels of such occupier or tenant, and to retain thereout the moneys so in arrear, and all costs and expenses occasioned by such distress and sale: provided that no occupier or tenant occupying such land shall be liable to pay to any mortgagee a greater sum than the amount of rent which, at the time of making such distress, is then due from such occupier or tenant to the mortgagor, or to the person claiming the said land under the mortgagor, and any amount so paid shall be held to be pro tanto in satisfaction of such rent.

107. (1) The receipt or receipts in writing of the mortgagee shall be a sufficient discharge to the purchaser of the mortgaged land, estate, or interest, or of any portion thereof, for so much of his purchase money as may be thereby expressed to be received.

(2) Such purchaser shall not be answerable for the loss, misapplication, or non-application, or be obliged to see to the application of the purchase money by him paid, nor shall he be concerned to enquire as to the fact of any default or notice having been made or given as aforesaid.

108. The purchase money to arise from the sale of any such land, estate, or interest shall be applied—

(*a*) Firstly, in payment of the expenses occasioned by such sale:

(*b*) Secondly, in payment of the moneys then due or owing to the mortgagee:

(*c*) Thirdly, in payment of subsequent registered mortgages or incumbrances (if any), in the order of their priority; and the surplus (if any) shall be paid to the mortgagor, as the case may be.

109. Upon the registration of any transfer executed by a mortgagee for the purpose of such sale, the estate or interest of the mortgagor, therein expressed to be transferred, shall pass to and vest in the purchaser, freed and discharged from all liability on account of such mortgage, or of any estate or interest registered subsequent thereto.

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Sale of mortgaged property by registrar of Supreme Court.

110. (1) Any present or future mortgagee of land may, at any time after he has become entitled to exercise the power of sale contained or implied in his mortgage, apply in writing to the registrar who is acting within the land registration district in which the land intended to be sold is situate, or if that land is situate in more districts than one, then to the registrar acting in any one of such districts, to conduct the sale of the whole or any part of the land comprised in the mortgage, and in such application shall state the value at which he estimates the land to be sold.

(2) The registrar shall fix a convenient time (being not more than three months and not less than one month from the date of the application) and a convenient place for the sale, give such notice of the sale by advertisement in some newspaper circulating in the neighbourhood as he deems sufficient, approve of proper conditions of sale, employ an auctioneer, and do all other necessary acts for carrying out the sale.

(3) For the purposes of this and the next succeeding five sections "registrar" means the registrar of the Supreme Court, and includes a deputy registrar where there is no registrar, or in any case where the deputy may lawfully act for and on behalf of the registrar.

111. At any time before the sale the mortgagor may pay to the mortgagee either the value of the land, as estimated by the mortgagee, or the amount due and owing under the mortgage, together with the expenses already incurred by the mortgagee in connexion with the intended sale, and any moneys expended by him on or about the land subsequently to the time when he estimated the value thereof as aforesaid; and on such payment the mortgagee shall do the acts required by the twelfth clause of the fourth schedule hereto: provided that where the sum so paid is less than the amount owing under the mortgage, the balance may be recovered from the mortgagor under the covenant to repay expressed or implied in the mortgage.

112. (1) The mortgagee may be a bidder at any such sale conducted as aforesaid, and become the purchaser of the land or any part thereof.

(2) In the event of the mortgagee being declared the purchaser, the said registrar shall, on demand by the mortgagee, execute a transfer of the land purchased, expressed to be made between the registrar (describing him by his official description only) and the mortgagee, with or without the addition of any other parties, and containing a recital that such sale has been made under this section.

(3) In such transfer the consideration to be stated shall be not less than the value of the land as estimated by the mortgagee as aforesaid.

(4) A transfer in pursuance of any such sale may be made by the registrar to any person whom the mortgagee in writing may appoint, instead of to the mortgagee, and shall have the same force and effect in favour of the person to whom it is made as it would have had if made to the mortgagee.

(5) Where any sale made under the provisions of the Land Transfer Act 1885 has not been completed by the execution of a proper transfer, the transfer may be made in the same manner and with the same effect as if such Act had continued in force, and for the purpose

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only of completing such sale such Act shall continue in force accordingly.

113. Any transfer executed by the registrar, upon a sale made after the first day of January, 1906 (being the date of the coming into operation of the Property Law Act 1905), shall in favour of any person (other than a mortgagee purchasing under the last preceding section, or any person appointed by him) claiming by, through, or under such transfer (including a person claiming under a transfer to the mortgagee) in good faith and for valuable consideration, be conclusive proof that all the provisions of this Act relating to the sale have been complied with, and that all things have happened and all times have elapsed to authorize such transfer to be made.

114. (1) In respect of every application under section 110 hereof there shall be paid to the registrar by the mortgagee, in addition to the reasonable expenses of and incidental to the sale,—

Where the land is sold, a fee of one-eighth per centum where the purchase money does not exceed two hundred pounds, and where the purchase money exceeds that sum one-quarter per centum on the remainder of the purchase money, but in no case shall such fee be less than one pound nor more than twenty pounds.

(2) In any case where the land sold is sold subject to a mortgage, the moneys secured by the mortgage shall be deemed to be "purchase money" within the meaning of this section.

115. (1) Every transfer made and executed in favour of the mortgagee, or by his direction as aforesaid, may be registered under this Act.

(2) Upon such registration the land, or the estate or interest of the mortgagor therein expressed to be transferred, shall vest in the transferee, freed and discharged from all liability on account of the mortgage under which such power of sale has been exercised, or of any estate or interest registered subsequent thereto.

116. (1) Upon the production of any memorandum, by endorsement on the mortgage or otherwise, signed by the mortgagee and duly attested, discharging the land, estate, or interest from the whole or part of the principal sum or annuity secured, or discharging any part of the land comprised in such mortgage from the whole or any part of such principal sum or annuity, the registrar shall make an entry in the register and on the outstanding instrument of title, noting that such mortgage is discharged wholly or partially.

(2) Upon such entry being made, the land, estate, or interest mentioned or referred to in such memorandum, shall cease to be subject to or liable for such principal sum or annuity, or for the part thereof noted in such entry as discharged.

(3) The outstanding duplicate of every mortgage wholly or partially discharged as aforesaid shall be surrendered to the registrar to be cancelled or part cancelled, as the case may be, unless the registrar sees reasonable cause to dispense with such surrender.

(4) A mortgage subject to a sub-mortgage shall not be discharged, nor shall the terms thereof be varied, nor shall the power of sale contained or implied therein be exercised, without the consent in writing of the sub-mortgagee.

(5) The consent of the sub-mortgagee to the variation of the terms of a mortgage shall render the instrument making the variation

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binding on him, and on all persons who may subsequently derive from him any interest in the mortgage.

Absent mortgagees.

117. (1) Where any mortgagee is absent from New Zealand, or is dead, and, so far as the mortgagor is aware, there is no person in New Zealand authorized to give a discharge of the mortgage debt at or after the time appointed for the redemption of the mortgage, the public trustee, on tender to him of the mortgage debt, and on proof to his satisfaction that the amount tendered is the whole amount due under the mortgage, may receive the same in trust for the mortgagee or other person entitled thereto.

(2) Upon presentation of the receipt of the public trustee for the amount of the said mortgage money and interest, the registrar shall make an entry in the register discharging such mortgage, stating the day and hour on which such entry is made.

(3) Such entry shall be a valid discharge for such mortgage, and shall have the same force and effect as is hereinbefore given to a like entry, when made upon production of the mortgage with the receipt of the mortgagee.

(4) The registrar shall also endorse on the grant, certificate of title, or other instrument as aforesaid, and also on the memorandum of mortgage, whenever those instruments are brought to him for that purpose, the several particulars hereinbefore directed to be endorsed upon each of such instruments respectively.

(5) The production of the public trustee's receipt for the mortgage moneys shall be sufficient authority to the person in possession of the instruments of title to the mortgaged property to deliver the same to the mortgagor.

(6) A judge of the Supreme Court may, in a summary way, order any person in possession of the instruments of title to the mortgaged property to deliver them to the mortgagor, on production of the public trustee's receipt for the mortgage moneys, and on payment of all proper charges (if any).

Other rights of mortgagees.

118. Every mortgagee of land under this Act shall, as against the mortgagor and those claiming through or under him, if default has been made in payment of the interest, or annual or principal sum secured by any mortgage, or any part thereof, for the time specified by this Act or otherwise provided in such instrument, have all the like remedies for obtaining possession of the mortgaged land as are by law given to a landlord against a lessee or tenant whose term is expired or rent in arrear.

119. No right of recovery of possession by any lessor or mortgagee of land under this Act shall extend to bar the right of any mortgagee of any lease, or any part thereof, who is not in possession, if such mortgagee pays all rent in arrear, and all costs and damages sustained by the lessor or person entitled to exercise such right of recovery, and performs all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed.

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120. Every mortgagee of leasehold land under this Act, or any person claiming the said land as a purchaser or otherwise from or under such mortgagee, after entering into possession of the said land or the rents and profits thereof, shall, during such possession and to the extent of any rents and profits which may be received by him, become and be subject and be liable to the lessor of the said land, or the person for the time being entitled to the said lessor's estate or interest in the said land, to the same extent as the lessee or tenant was subject to and liable for, prior to such mortgagee or other person entering into possession of the said land or the rents and profits thereof.

121. The mortgagee, or first mortgagee for the time being, of any estate or interest under this Act shall be entitled to the possession of the outstanding grant, certificate, or other instrument of title; or the same may by agreement be deposited with the registrar, for safe custody during the continuance of the security.

Discharge of annuity.

122. Upon proof of the death of the annuitant, or of the occurrence of the event or circumstance upon which, in accordance with the provisions of any instrument executed for the purpose of securing an annuity or continuing payment, such annuity or payment shall cease to be payable; and upon proof that all arrears thereof have been paid, satisfied or discharged, the registrar shall make an entry in the register of such satisfaction or discharge, and shall endorse the same on the outstanding duplicate of title, if produced to him for that purpose, and shall, if the same is surrendered to him, cancel the instrument creating the incumbrance.

Transmission.

123. (1) Any person claiming to be entitled to any estate or interest under this Act by virtue of any transmission may make application in writing to the registrar to have such transmission registered.

(2) Such application shall accurately define the estate or interest claimed by the applicant, and shall state, so far as is within the knowledge of the applicant, the nature of every estate or interest held by any other person at law or in equity affecting the same, and that he verily believes himself to be entitled to the estate or interest in respect of which he applies to be registered as proprietor, and the statements in such application shall be verified by the oath or statutory declaration of the applicant.

124. (1) If on such application, and upon the evidence adduced in support thereof, it appears to the registrar and examiner of titles that the applicant is entitled to the estate or interest claimed, the registrar, with the concurrence of the examiner, shall register the applicant as proprietor thereof.

(2) The person so registered as proprietor shall hold the estate or interest transmitted subject to all equities affecting the same, but for the purpose of any dealing therewith shall be deemed to be the absolute proprietor thereof.

125. Upon the registration of a transmission under any will or settlement, the registrar and examiner of titles may direct a caveat to be entered by the registrar, for the protection of the interests of per-

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sons appearing by such will or settlement to be beneficially interested in the estate or interest the subject of such transmission.

126. Upon the bankruptcy of the registered proprietor of any lease subject to mortgage under this Act, the registrar, upon the application in writing of the mortgagee, accompanied by a statement in writing signed by the official assignee of the bankrupt's estate, certifying his refusal to accept such lease, shall enter in the register the particulars of such refusal.

127. Such entry shall operate as a transfer on sale, and the interest of the bankrupt in such lease shall thereupon vest in such mortgagee.

128. If such mortgagee neglects or declines to make such application as aforesaid, the registrar, upon application by the lessor, and proof of such neglect or refusal and of the matters aforesaid, shall enter in the register notice of the refusal of the official assignee to accept such lease, and such entry shall operate as a surrender of such lease.

129. Upon the production of proof of the marriage of a female registered proprietor of any land, estate, or interest under this Act, accompanied by a statement in writing signed by such female proprietor to that effect, the registrar shall enter on the register, and also upon the outstanding duplicate of title (*sic*), the name and description of her husband, the date of the marriage and where solemnized, and the date and hour of the production to him of the evidence of such marriage.

Trusts.

130. (1) Except as provided in Appendix I to this Act in relation to public reserves and other public lands, no entry shall be made in the register of any notice of trusts, and no such entry, if made, shall have any effect.

(2) Trusts affecting land under this Act may be declared by any deed or instrument; and such deed or instrument, or a duplicate or attested copy thereof, may be deposited with the registrar for safe custody and reference, but shall not be registered.

131. Upon the transfer of any land, estate, or interest under this Act to two or more persons as joint proprietors, the transferor may insert in the memorandum of transfer or other instrument the words "no survivorship," and the registrar shall note the same in the register, and also enter the said words upon any certificate of title issued pursuant to such transfer.

132. Any persons registered as joint proprietors of any land, estate, or interest under this Act may, by writing under their hands, authorize the registrar to enter the words "no survivorship" upon the grant, certificate of title, or other instrument evidencing their title to such estate or interest, and also upon the duplicate of such instrument.

133. After such entry has been made and signed by the registrar in either case as aforesaid, it shall not be lawful for any less number of joint proprietors than the number then registered to transfer or otherwise deal with the said land, estate, or interest without obtaining the sanction of the Supreme Court, or a judge thereof, by an order on motion or petition.

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134. (1) Before making any such order the Court or judge shall, if it seems requisite, cause notice of intention so to do to be advertised in the Gazette, and in at least one newspaper published in the district in which the land is, and shall appoint a time within which any person interested may show cause why such order should not be issued.

(2) Thereupon the said Court or judge in such order may give directions for the transfer of such land, estate, or interest to any new proprietor or proprietors, solely or jointly, with or in the place of any existing proprietor or proprietors, or may make such order in the premises as the Court thinks just for the protection of the persons beneficially interested in such land, estate, or interest, or in the proceeds thereof.

(3) Upon such order being deposited with the registrar, he shall make such entries and perform such acts as may be necessary for the purpose of giving effect to such order.

135. (1) If the registered proprietor of any land, or of any estate or interest under this Act, is desirous of transferring the same to two or more persons in trust, such proprietor, in the instrument or deed declaring such trust, may nominate and appoint the registrar of the district within which the land is, by the style of his office, to be one of such trustees.

(2) It shall thereupon be the duty of such registrar for the time being to act as such trustee, so far as relates to the transfer of such land, estate, or interest.

136. (1) Whenever a person entitled to or interested in land as a trustee would be entitled to bring or defend any action in his own name, for recovering the possession of land under this Act, such person shall be bound to allow his name to be used as a plaintiff or defendant in such action by any beneficiary or person claiming an estate or interest in the said land.

(2) In every such case the person entitled or interested as such trustee shall be entitled to be indemnified, in like manner as a trustee would before the coming into operation of the Land Transfer Act 1885 have been entitled to be indemnified in a similar case of his name being used in any such action or proceeding by his cestui que trust.

Registration abstract.

[137-144: N. Z. 1885, ss. 129-136, Aust. Torr. Syst. 293, 294.]

Caveat.

145. Any person having or claiming an interest in any land the subject of an application to bring the same under this Act may, at any time within the time limited for that purpose by advertisement as hereinbefore provided, lodge with the registrar a caveat in the form K in the second schedule hereto.

146. Any person—

(*a*) Claiming to be entitled to, or to be beneficially interested in, any land, estate, or interest under this Act by virtue of any unregistered agreement, or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or

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(*b*) Transferring any estate or interest under this Act to any other person to be held in trust—

may at any time lodge with the registrar a caveat in the form L in the second schedule hereto.

147. (1) Every caveat shall be signed by the caveator or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator, with such other information and evidence as may be required by regulations under this Act, and shall appoint a place or give an address within the district at or to which notices and proceedings relating to such caveat may be served or addressed.

(2) Every caveat shall be entered on the register as of the day and hour of the reception thereof by the registrar.

148. Every notice relating to a caveat, and any proceedings in respect thereof, if served at the place appointed in the caveat, or forwarded through the post office by registered letter addressed as aforesaid, shall be deemed duly served.

149. So long as a caveat in the form K remains in force, the registrar shall not proceed with the bringing under this Act of the land affected thereby, nor shall it be lawful for the person making such application to withdraw the same, except with the consent of the caveator, or by leave of a judge of the Supreme Court.

150. So long as a caveat in the form L remains in force, the registrar shall not make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by such caveat, or issue any registration abstract in respect thereof: provided that nothing herein shall prevent the completion of the registration of an instrument which has been accepted for registration before the receipt of the caveat.

151. Upon the receipt of any caveat the registrar shall notify the same to the person against whose application to bring land under this Act, or to be registered as proprietor consequent on any transmission, or to the registered proprietor against whose title to deal with land under this Act, such caveat has been lodged.

152. (1) Such applicant or registered proprietor may, if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the Supreme Court or a judge thereof, to show cause why such caveat should not be removed.

(2) Such Court or judge, upon proof that such person has been summoned, may make such order in the premises, either ex parte or otherwise, as to such Court or judge seems meet.

153. After the expiration of three months from the receipt thereof every caveat in the form K shall be deemed to have lapsed unless the person by whom or on whose behalf the same was lodged has within that time taken proceedings in any court of competent jurisdiction to establish his title to the estate, interest, lien, or charge therein specified, and has given written notice thereof to the registrar, or has obtained from the Supreme Court an order or injunction restraining the registrar from bringing the land therein referred to under this Act.

154. Except in the case of a caveat lodged by or on behalf of a beneficiary claiming under any will or settlement, or for the protection of any trust, or by the registrar in exercise of the powers by this Act given to him in that behalf, every caveat in the form L shall, upon

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the expiration of fourteen days after notice given to the caveator that application has been made for the registration of any instrument affecting the land, estate, or interest protected thereby, be deemed to have lapsed as to such land, estate, or interest, or so much thereof as is referred to in such notice, unless notice is, within the said fourteen days, given to the registrar that application for an order to the contrary has been made to the Supreme Court or a judge thereof, and such order is made and served on the registrar within a further period of fourteen days.

155. (1) Any person lodging any caveat without reasonable cause is liable to make to any person who may have sustained damage thereby such compensation as may be just.

(2) Such compensation shall be recoverable in an action at law by the person who has sustained damage from the person who lodged the caveat.

156. Any caveat may be withdrawn by the caveator, or by his attorney or agent under a written authority, and either as to the whole or any part of the land affected, or the consent of the caveator may be given for the registration of any particular dealing expressed to be made subject to the rights of the caveator.

157. When any caveat in either of the forms hereinbefore provided has lapsed, it shall not be lawful for the registrar to receive any second caveat affecting the same land, estate, or interest by the same person, or in the same right and for the same cause, except by order of the Supreme Court or a judge thereof.

Powers of attorney.

158. The bringing of land under this Act shall not invalidate any power of attorney previously executed, but such land may thereafter be dealt with under such power subject to the provisions hereof.

159. The registered proprietor of land under this Act, or any person claiming any estate or interest under this Act, may by power of attorney in the form numbered (1) in the third schedule hereto, or in any usual form, and either in general terms or specially, authorize and appoint any person on his behalf to execute transfers or other dealings therewith, or to make any application to the registrar or to any Court or judge in relation thereto.

160. Every power of attorney intended to be used under this Act, or a duplicate or attested copy thereof, verified to the satisfaction of the registrar, shall be deposited with the registrar in manner provided by regulations under this Act, but for the purposes of this Act it shall not be necessary to register any power of attorney.

161. (1) The grantor of any revocable power of attorney may, by notice to the registrar in the form numbered (2) in the third schedule hereto, revoke the same, either wholly or as to the land specified in such notice.

(2) No power of attorney shall be deemed to have been revoked by reason only of a subsequent power of attorney being deposited without express notice as aforesaid, nor shall any such revocation take effect as to instruments executed prior to the reception of such notice by the registrar.

(3) No power of attorney shall be deemed to have been or to be revoked by the bankruptcy of the grantee, or by the marriage of a female grantee.

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162. No power of attorney made or used under this Act, or any former Land Transfer Act, shall be invalidated by reason of such power not having been created under seal.

163. Subject to the foregoing provisions, the provisions of the Property Law Act 1908, relating to powers of attorney, shall apply to powers of attorney made or used under this Act.

Covenants implied in instruments.

164. In every instrument charging, creating, or transferring any estate or interest under this Act there shall be implied the following covenants, by the party charging, creating, or transferring such estate or interest, to and with each and every person taking any estate or interest under such instrument—

(*a*) That the (implied) covenantor will do all such acts as may be necessary on his part to give effect to all covenants, conditions, and purposes expressly set forth in such instrument, or by this Act declared to be implied in instruments of a like nature:

(*b*) That the (implied) covenantor will, at the request and cost of the person taking any estate or interest as aforesaid, execute all such further instruments as may be necessary for further and better assuring and perfecting the title of such person as last aforesaid to the estate or interest expressed or intended to be granted, created or transferred.

165. Such of the covenants set forth at length in the sixth schedule hereto as are intended to be implied in any instrument executed for the purpose of registration under this Act shall, if expressed in the short form of words prescribed in the said schedule for the case of each covenant respectively, be implied in such instrument as fully and effectually as if such covenants were set forth therein at length in the words of the said schedule, with all such modifications as may be necessary in order to adapt them to the instrument.

166. (1) Every covenant and power implied or existing in any instrument by virtue of this Act may be negatived, modified, enlarged or extended, by express declaration in such instrument or endorsed thereon.

(2) Every such covenant or power shall, subject to any such declaration as aforesaid, have the same force and effect, and be enforced in the same manner, as if it had been set out at length in such instrument.

(3) Where any such instrument is executed by more parties than one, such covenants as are by virtue of this Act therein implied or existing shall be construed to be several, and also to bind the parties, or any two or more of them, jointly.

167. In any action for a breach of any such covenant, the covenant alleged to be broken may be set forth in the statement of claim, and it may be alleged that the party against whom such action is brought did so covenant, precisely in the same manner as if such covenant had been expressed in words in such instrument, any law or practice to the contrary notwithstanding.

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Execution of instruments.

168. (1) Every instrument executed for the purpose of creating, transferring, or charging any estate or interest under this Act, shall be signed by the registered proprietor and attested by at least one witness, and if the instrument is executed in New Zealand such witness shall add to his signature his place of abode and calling, office or description, but no particular form of words shall be requisite for the attestation.

(2) Every instrument so executed shall, when registered, have the force and effect of a deed executed by the parties signing the same.

169. Instruments executed as aforesaid shall be held to be duly attested, and the execution thereof may be proved before a district land registrar, assistant land registrar, or any deputy of either of such officers, or before a notary public, justice of the peace, or a solicitor of the Supreme Court, if the parties executing the same are resident within New Zealand, by the oath or statutory declaration of the parties executing the same, or of a witness attesting the signing thereof.

[170, 171: N. Z. 1885, ss. 162, 163, Aust. Torr. Syst. 299.]

172. A married woman shall, for the purpose of any dealing by her under this Act, be deemed a feme sole.

173. A corporation, in lieu of signing any instrument, may execute the same by affixing thereto the common seal of the corporation, or the official seal for use in New Zealand, or by attorney appointed under such common or official seal; and such seal affixed to any instrument shall be sufficient proof to the registrar that the same was affixed under proper authority, and that such instrument is binding on the corporation whose seal it bears.

174. Every instrument registered under this Act shall, if purporting to have been executed in accordance with the provisions of this Act, be presumed to have been duly executed, and shall be received in evidence as such in any court of law or equity, unless the contrary is proved.

[175: N. Z. 1885, s. 168, Aust. Torr. Syst. 300.]

Verification of instruments.

176. (1) Every instrument of any kind heretofore or hereafter duly executed out of New Zealand shall, so far as regards the execution thereof, be admissible in evidence in any court of justice in New Zealand, and before any officer or person having by law or consent of parties authority to hear, receive, and examine evidence in New Zealand, if such execution is verified in any of the following ways, that is to say:—

(*a*) Where the instrument is executed in any part of the British dominions other than New Zealand, then either—

(i) In accordance with the provisions in that behalf of the Imperial Act now known by the short title of the Statutory Declarations Act 1835; or

(ii) In accordance with the law in force in that part of the British dominions where the verification takes place, as to verifying the execution of instruments to be used abroad:

(*b*) Where the instrument is executed in any foreign country, then if it purports to have been executed before a British

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minister or consul exercising his functions in that country, and to be sealed with his seal of office (if any), or if there is endorsed thereon or annexed thereto a declaration of the due execution thereof, purporting to be made by an attesting witness thereto before any such minister or consul as aforesaid, and to be sealed as aforesaid.

(2) It shall be presumed that any seal or signature impressed, affixed, appended, or subscribed on or to any document tendered in evidence under this section is genuine, and that the person appearing to have signed or attested any such document had in fact authority to sign or attest the same, and that any such document was in fact made in accordance with the law under which it purports to have been made, unless the party objecting to the admission of the document proves the contrary.

(3) In this section—

"Consul" includes a consul-general, consul, vice-consul, acting-consul, proconsul, and consular agent:

"Minister" includes an ambassador, envoy, minister, chargé d'affaires, and secretary of embassy or legation.

Surveys.

[177, 180-182: N. Z. 1885, ss. 170, 174, &c., Aust. Torr. Syst. 301, 302, 328, 329.]

178. On an application to bring land under the provisions of this Act, or for a new certificate on the subdivision of or other dealing with the land comprised in any certificate or other instrument of title or any part thereof, or for the untransferred part of the land comprised in any such certificate or other instrument of title, the registrar may require the applicant to deposit in the land registry office of the district a plan of the land or subdivision or portion thereof, as the case may be, which plan shall be in accordance with the regulations for the time being in force in that behalf, and shall be verified by the statutory declaration of a licensed surveyor in such form as the regulations prescribe; and until such requisition is complied with the registrar shall not be bound to proceed with the application.

179. (1) The deposit of a plan of subdivision of any land shall not operate as a dedication for public purposes of roads shown on such plan, but a right of way over all such roads shall be appurtenant to every portion of the land in such subdivision, unless expressly excepted.

(2) Every instrument in which land is described by reference to a deposited plan shall take effect, according to the intent and meaning thereof, as if such plan was fully set out thereon.

Additional powers of registrar.

183. Every registrar, in addition to the powers hereinbefore vested in him, may exercise all or any of the powers following, that is to say:—

(*a*) He may require the proprietor, or other person making or concurring in any application under this Act, to produce any deed or instrument in his possession or control relat-

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ing to the land the subject of such application, and if necessary, to attend and give any information or explanation concerning the same:

(*b*) He may require any person having in his possession or control any grant, certificate, or other instrument upon which any memorial or entry is required to be endorsed for the purposes of this Act, to produce such instrument within a reasonable time to be fixed by such notice, and to deposit the same in the land registry office of his district, for such time as may be necessary for the making of such endorsement or entry:

(*c*) He may, if in his opinion the number or nature of the entries on any folium of the register renders it expedient to close the same, or if any document of title has become worn, defaced, or mutilated so as to justify his so doing, require the holder of the outstanding duplicate of title (*sic*) to surrender the same for cancellation; and upon such cancellation a new certificate shall be issued to the person entitled thereto, upon payment of the prescribed fee: provided that the registrar may at his discretion remit such fee, except in case of wilful defacement or mutilation of any instrument:

(*d*) He may enter caveats for the protection of any person who is under the disability of infancy, coverture, lunacy, unsoundness of mind, or absence from New Zealand, or on behalf of the Crown, to prohibit the transfer or dealing with any land within his district belonging or supposed to belong to any such persons as hereinbefore mentioned, and also to prohibit the dealing with any land within his district, in any case in which it appears to him that an error has been made by misdescription of such land or otherwise, in any certificate of title or other instrument, or for the prevention of any fraud or improper dealing:

(*e*) He may administer oaths, or may take a statutory declaration in lieu of administering an oath.

184. (1) If, upon requisition in writing made by a registrar for any purpose mentioned in the last preceding section, any proprietor or other person without reasonable cause refuses or neglects—

(*a*) To produce, surrender, or deposit any instrument, or to allow the same to be inspected; or

(*b*) To give any explanation which he is hereinbefore required to give—

he is liable to a fine not exceeding five pounds, for each day during which such refusal or neglect continues.

(2) Such fine may be recovered at the suit of the registrar in any court of competent jurisdiction, and the offender shall, in addition thereto, be liable to make compensation to any person who has sustained loss or damage by reason of such refusal or neglect.

Assurance fund.

185. (1) Upon the first bringing of land under this Act upon application of the proprietor, there shall be paid to the registrar the

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sum of one halfpenny in the pound sterling upon the value of the land brought under the Act.

(2) Such value shall be ascertained by the oath or solemn affirmation of the applicant or proprietor.

(3) If the registrar is not satisfied as to the correctness of the value so declared or sworn to, he may require a certificate of such value under the hand of a sworn valuator, which certificate shall be received as conclusive evidence for the purpose aforesaid.

(4) All sums collected under the foregoing provisions shall be paid to the public account, to the credit of an account to be called "the land assurance fund account."

186. Any person—

(*a*) who sustains loss or damage through any omission, mistake, or misfeasance of any registrar, or of any of his officers or clerks, in the execution of their respective duties; or

(*b*) Who is deprived of any land, or of any estate or interest in land, through the bringing of the same under the Land Transfer Acts, or by the registration of any other person as proprietor of such land, or by any error, omission, or misdescription in any certificate of title, or in any entry or memorial in the register, or has sustained any loss or damage by the wrongful inclusion of land in any certificate as aforesaid, and who by this Act is barred from bringing an action for possession, or other action for the recovery of such land, estate, or interest—

may bring an action against the registrar-general, as nominal defendant, for recovery of damages.

187. In case the plaintiff recovers final judgment against such nominal defendant, then the court or judge before whom such action is tried shall certify to the minister of finance the fact of such judgment and the amount of damages and costs recovered; and the said minister thereupon, and upon the receipt of a warrant under the hand of the Governor, shall pay the amount of such damages and costs to the person recovering the same, and charge the same to the account of the assurance fund.

188. (1) Notice in writing of every action against the registrar-general, and of the cause thereof, and of the amount claimed, shall be served upon the attorney-general, and also upon the registrar-general, one month at least before the commencement of such action.

(2) If the aforesaid officers concur that such claim ought to be admitted, as to the whole or any part thereof, without suit or action, and jointly certify to that effect, the Governor may issue his warrant to the minister of finance for payment accordingly.

(3) If after notice of such admission has been served on the claimant, his solicitor or agent, the claimant proceeds with such action, and recovers no more than the amount admitted, he shall not be entitled to recover any costs as against the nominal defendant, and shall be liable to such defendant for the costs of defending the action, in like manner as if judgment had been given for the defendant in such action.

189. If in any such action judgment is given in favour of the nominal defendant, or the plaintiff discontinues or becomes nonsuit,

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the plaintiff shall be liable to pay the full costs of defending such action; and the same, when taxed, shall be levied in the name of the nominal defendant, by the like process of execution as in other actions.

[190-192: N. Z. 1885, ss. 182-184, Aust. Torr. Syst. 305, 306.]

193. The assurance fund shall not under any circumstances be liable for compensation for any loss, damage, or deprivation occasioned by any of the following things, notwithstanding that effect may have been given to the same by entry on the register:—

(*a*) By the breach by a registered proprietor of any trust; or

(*b*) By the same land having been included in two or more grants from the Crown; or

(*c*) By the improper use of the seal of any corporation or company; or

(*d*) By the registration of any instrument executed by any person under any legal disability, unless the fact of such disability was disclosed on the instrument by virtue of which such person was registered as proprietor; or

(*e*) By the improper exercise of any power of sale or re-entry.

194. (1) No person shall, as against the registrar-general or the assurance fund, be entitled to recover any greater amount for compensation in respect of the loss or deprivation of any land, or of any estate or interest therein, than the value of such land, estate, or interest at the time of such deprivation, together with the value of the messuages and tenements erected thereon and improvements made thereto (if any) prior to the time of such deprivation, with interest at the rate of five per centum per annum to the date of judgment recovered.

(2) In case the assurance fund for the time being is insufficient to satisfy any claim, the deficiency shall be paid out of the consolidated fund, and shall be a first charge upon the assurance fund.

195. No action for recovery of damages as aforesaid shall lie or be sustained against the registrar-general, unless such action is commenced within the period of six years from the date when the right to bring such action accrued; but any person being under the disability of coverture, infancy, unsoundness of mind, or absence from New Zealand, may bring such action within three years from the date on which such disability ceased.

196. The plaintiff in any such action [&c., V. 1915, s. 256, *ante* p. 458.]

Protection of purchasers.

[197: V. 1915, s. 179, *ante* p. 441.]

198. (1) Nothing in this Act shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser or mortgagee bonâ fide for valuable consideration of land under the provisions of this Act, on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor

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through fraud or error, or under any void or voidable instrument, and this whether such fraud or error consists in wrong description of the boundaries, or of the parcels of any land, or otherwise howsoever.

(2) This section shall be read subject to the provisions of sections 70 and 72 hereof.

[199-206: N. Z. 1885, ss. 191-198, Aust. Torr. Syst. 308, 309.]

207. Any three or more of the judges of the Supreme Court, of whom the chief justice shall be one, may from time to time make rules and orders for regulating proceedings in the Supreme Court under this Act: provided that such rules and orders shall be subject to the approval of the Governor in Council.

Offences.

[208-212: N. Z. 1885, ss. 200-204, Aust. Torr. Syst. 309, 310.]

Land-brokers and valuators. Miscellaneous.

213. (1) The registrar-general may, with the sanction of the Governor, license fit and proper persons to be land-brokers for transacting business under this Act; and, with like sanction, may from time to time prescribe the charges recoverable by such brokers for such business, by any scale not exceeding the charges specified in the eighth schedule hereto; and for every such license may charge and receive the fee of five pounds annually.

(2) Every such license shall continue in force until the thirty-first day of December next after the date thereof.

[214, 215: N. Z. 1885, ss. 205, 206, Aust. Torr. Syst. 310.]

216. Any person who, not being the holder of a license as a land-broker under this Act, or of a certificate for the time being in force to the effect that he is on the roll of the Supreme Court as a barrister or solicitor thereof, transacts business for fee or reward under this Act, or wilfully and falsely pretends to be entitled to transact such business, is for each offence liable to a fine not exceeding fifty pounds.

[217-219: N. Z. 1885, ss. 209-211, Aust. Torr. Syst. 311.]

220. No application or instrument, for which a form is prescribed by any of the schedules to this Act, shall be received or registered unless written upon a printed form supplied by the stamp office or approved by the registrar, unless such application or instrument is executed under circumstances which, in the opinion of the registrar, reasonably excuse the omission to use such printed form.

221. The registrar-general may from time to time make such variations in the forms prescribed in the schedules hereto as he deems necessary or expedient, and every form authenticated by his seal, or by the seal of the registrar of the district within which the same is used, shall be taken to be a duly authorized form, unless the contrary is proved.

222. In any form under this Act the description of any person as proprietor, transferor, transferee, mortgagor, mortgagee, lessor or lessee, or as trustee, or as seised of, having, or taking any estate or interest in any land, shall be deemed to include the heirs, executors, administrators, and assigns of such person.

223. (1) Where a form in any of the schedules hereto is directed to be used, such direction shall apply equally to any form to the like

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effect, signed by a registrar or stamped with his seal, or which for the same purpose may be authorized in conformity with this Act.

(2) Any variation from such forms, not being in matter of substance, shall not affect their validity or regularity, but they may be used with such alterations as the character of the parties or circumstances of the case render necessary.

[224-228: N. Z. 1885, ss. 216-220, &c., Aust. Torr. Syst. 312, 330.]

229. The special provisions contained in the several Appendices I, II, and III annexed to this Act are hereby enacted, and shall be deemed to form part of this Act.

230. Where by any unrepealed Act any act, matter, or thing is authorized to be done, or any memorial is authorized or directed to be registered under any former Land Transfer Act, such act, matter, or thing may be done, or such memorial registered, under this Act, unless the same is inconsistent with the express provisions hereof.

231. Where in any unrepealed Act, or in any deed, instrument, or other document made before the coming into operation of this Act, reference is made to any former Land Transfer Act, such reference shall be construed and shall operate as if it had been made to this Act, or to such of the provisions of this Act as correspond to those of the Act so referred to.

APPENDICES (s. 229).

APPENDIX I.

Public reserves and other public lands.

. . . . . .

APPENDIX II.

Canterbury Educational Reserves.

. . . . .

APPENDIX III.

Unincorporated building societies—Mortgages.

. . . . . .

[See N. Z. 1885, Appendices, Aust. Torr. Syst. 314-316.]

SCHEDULES.

[The only schedules partly printed here are schs. 4 and 5. For those that are not here printed, see N. Z. 1885 and 1902, Aust. Torr. Syst. 316 *et seq.*, 1045-1048.]

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FOURTH SCHEDULE.

COVENANTS, CONDITIONS, AND POWERS IMPLIED IN MORTGAGES.

[s. 103 *ante*, p. 491.]

[Clauses 1-11: N. Z. 1902, sch. 2, Aust. Torr. Syst. 1046, 1047.]

(12) That the mortgagee will, on payment by the mortgagor of all moneys due under the mortgage at the time and in the manner mentioned in the mortgage for payment of the principal sum, or at any time thereafter on payment of all moneys then due (three clear months' notice of the intention to pay the same having been given), return to the mortgagor the instrument of mortgage, having endorsed thereon or annexed thereto a memorandum of discharge as provided in section 116 of the Land Transfer Act 1915, together with all instruments and documents deposited with the mortgagee on account of the mortgage.

(13) The expressions "mortgagor" and "mortgagee" in the above provisions shall, where such meaning is not inconsistent with the context, extend to and include the executors, administrators, and assigns of the mortgagor and mortgagee respectively.

FIFTH SCHEDULE.

(1) MEMORANDUM OF INCREASE OR REDUCTION OF MORTGAGE DEBT.

[N. Z. 1902, sch. 3, Aust. Torr. Syst. 1048.]

(2) MEMORANDUM OF INCREASE OR REDUCTION IN RATE OF INTEREST.

The rate of interest payable under the within- [*or* above-] written [*or* annexed] mortgage is hereby increased [*or* reduced] to £ per annum.

Dated this day of , 19

A. B., Mortgagor.

Witness to the signature of the said A. B., as mortgagor:

E. F.,

[*Occupation and address.*]

C. D., Mortgagee.

Witness to the signature of the said C. D. as mortgagee:

G. H.,

[*Occupation and address*].

(3) MEMORANDUM OF RENEWAL, SHORTENING, OR EXTENSION OF TERM OR CURRENCY OF MORTGAGE.

The term or currency of the within- [*or* above-] written [*or* annexed] mortgage is hereby renewed, shortened, or extended to the day of , 19 , [*or as the case may be*].

Dated this day of , 19 .

A. B., Mortgagor.

Witness to the signature of the said A. B., as mortgagor:

E. F.,

[*Occupation and address*].

C. D., Mortgagee.

Witness to the signature of the said C. D. as mortgagee:

G. H.,

[*Occupation and address*].

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FIJI.

REAL PROPERTY ORDINANCE, 1876

(No. 7 of 1876).

[*1906 Edition of Statutes.*]

An Ordinance to provide for the transfer of land by registration of titles.

[*1st March, 1877*].

[This, the statute referred to in the text, is the Ordinance as it appears in the new Edition of the Statutes published in 1906. It is merely a consolidation of the three Ordinances of 1876, 1883, and 1892; the sections of the new statute are numbered to correspond with those of the original Ordinance of 1876 (No. 24), the amending Ordinances being incorporated in their proper places. All those Ordinances are printed in Aust. Torr. Syst. 668 *et seq.*, 704 *et seq.*, and 708. Ss. 126 and 127 of the original 1876 statute do not appear in the present statute, which consists of 125 sections only.]

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FEDERATED MALAY STATES.

REGISTRATION OF TITLES ENACTMENT 1911

(Enactment No. 13 of 1911).

NOTE.—This federal statute (a consolidation of the State statutes mentioned in sch. 1) is an adaptation of the Fiji statute, omitting the sections specially relating to fee simple, fee tail, and life estates (as well as all reference to fee simple elsewhere), and the sections relating to bankruptcy and recovery of land from tenants, but adding one important section on the subject of statutory assurances, and also several sections providing for the registration of State leases. Another difference is that the word "charge," &c., is substituted for the word "mortgage," &c. Only those sections are here printed which differ materially from the Fiji statute.

An Enactment to consolidate the law regarding the Transfer of Land by Registration of Titles.

[*24th November, 1911.*]

IT is hereby enacted by the Rulers of the Federated Malay States in Council as follows:

PART I.—*Preliminary.*

1. (i) This Enactment may be cited as The Registration of Titles Enactment 1911, and shall come into operation upon [1st October, 1913].

(ii) Nothing in this Enactment contained shall apply to leases issued under any law in force for the time being relating to mining.

(iii) The Enactments specified in the first schedule hereto are hereby repealed [saving past operation].

(iv) All appointments made under the provisions of any of the Enactments hereby repealed shall be deemed to have been made under this Enactment.

2. In this Enactment, unless there be something repugnant in the subject or context—

The words "the State" mean with reference to any particular piece of land, or any right, title or interest therein, or any duty or obligation connected therewith, or any matter whatsoever incidental thereto, the State in which such land is situated, and the words "the Ruler" and "the Resident" mean, respectively, the Ruler or Rulers of that State and the Resident of that State.

"Charge" means any charge created on land for the purpose of securing the payment of money, and also the instrument by which the charge is created.

"Chargee" means the person in whose favour a charge is created, and includes the person for the time being entitled to the benefit of such charge.

"Collector" means the Collector of land revenue, or any other officer for the time being in charge of the land administration of a district.

"The Court" means the Court of a Judicial Commissioner.

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"Dealing" means any transaction, of whatever nature, by which land is affected under this Enactment, or under any Enactment hereby repealed.

"Grant" means a grant of State land issued by or under the authority of the Ruler of the State, and includes a lease of State land in perpetuity or for a term of not less than 999 years.

"Land" means land which was originally comprised in a grant, or in any such lease as is referred to in section 27, or for which a certificate of title has been issued under this Enactment or under any of the Enactments hereby repealed, and includes things attached to the earth or permanently fastened to anything attached to the earth.

"Lunatic" means any person who has been found by the Court to be incapable of managing his own affairs.

"Memorial" means the entry, signed by the registrar on the grant or certificate of title embodied in the register, of any instrument presented for registration, with the time of registration.

"Person of unsound mind" means any person who, though not having been found a lunatic by the Court, is, in fact, incapable of managing his own affairs.

"Proprietor" means the person or corporation registered under this Enactment, or under any of the Enactments hereby repealed, as the owner of land.

"Register" means the register of titles to land, kept in accordance with any of the Enactments hereby repealed, or to be kept in accordance with this Enactment.

"Registrar" means a registrar of titles appointed under this Enactment, and includes "deputy registrar."

The words "the registrar" mean with reference to any particular piece of land, or any right, title or interest therein, or any duty or obligation connected therewith, or any matter whatsoever incidental thereto, the registrar of the State or registration district in which such land is situated.

"Registration district" means a district created by the Resident under section 3 of this Enactment, or under any of the Enactments hereby repealed.

"Representative" means the person authorized by law to represent the estate of a person who is dead, or lunatic or otherwise under incapacity, and "certificate of representation" means the order of Court or other document by which such representative is appointed.

"Transfer," used in connexion with land or a charge, means the passing of such land or charge by act of the parties and not by operation of law, and also the instrument by which such passing is effected.

"Transmission," used in connexion with land or a charge, means the passing of such land or charge by operation of law—as, for example, on the death of the person entitled to such land or charge.

"Treasurer" means a State treasurer or district treasurer, as the case may require.

PART II.—*Creation of Districts and Appointment, Powers and Duties of Officers.*

3. In each State the Resident may, by warrant under his hand and seal, divide the State into districts for the purposes of this Enactment, and appoint, either for the State or for each such district, a

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registrar of titles, and such deputy registrars and other officers as he may think necessary for carrying out this Enactment.

4. Every registrar shall have a seal of office, with which he shall seal all certificates of title issued by him, and stamp all instruments presented to him for the purpose of authorizing an act of registration.

PART III.—*Government Grants, Trusts, Transfers and Transmissions of Land.*

5. After the coming into operation of this Enactment, and subject to the provisions of sub-section (ii) of section 1 hereof, all land which is comprised in any grant, whether issued prior or subsequent to the coming into operation of this Enactment, shall be subject to this Enactment, and shall not be capable of being transferred, transmitted, mortgaged, charged, or otherwise dealt with except in accordance with the provisions of this Enactment, and every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid, shall be null and void and of no effect, and, in particular, the provisions of part VIII relating to the enforcement of charges shall extend and apply to mortgages of land which have been executed before the coming into operation of this Enactment, so that the powers in such mortgages mentioned shall only be exercisable in accordance with the provisions of part VIII, or as near thereto as circumstances admit.

6. Grants shall be in duplicate, and every grant, in addition to proper words of description, shall contain a diagram of the land on such scale as the Resident may from time to time direct. The duplicate shall be delivered out of the collector's office to the registrar of the State or of the registration district in which the land is situated, who shall register the grant in manner hereinafter directed, and thereafter deliver one of such duplicates to the collector for issue to the grantee, and retain the other to be bound up in the register as hereinafter directed.

[7-12: Fi. 1876 (1906), ss. 13, 14, 16, 20-22, Aust. Torr. Syst. 670-672.]

13. All land shall, upon the death of the proprietor, pass to and become vested in his representative.

14. Land held in trust, transmitted under the last preceding section, shall continue to be subject to all trusts to which it was subject at the time of the death of the proprietor, and all other land so transmitted shall be included by the representative in his inventory and account, and shall, with the other property of the deceased, be disposable for payment of debts or otherwise, according to the law or custom of the State in which the land is situated.

[15-17: Fi. 1876 (1906), ss. 27-29, Aust. Torr. Syst. 672, 673.]

PART IV.—*Registration of Titles, Mode of Registration, Effect of Registration.*

[18-26: Fi. 1876 (1906), ss. 32-40, Aust. Torr. Syst. 673-675. S. 21 (Fi. 35) omits reference to "effect of a deed"; s. 25 (Fi. 39), omits reference to two instruments being "presented at the same time."]

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PART V.—*Special Provisions regarding certain Leases of State Land.*

27. Every registrar of titles appointed under the provisions of this Enactment shall keep a book to be called the "register of leases of State land," and shall bind up therein the duplicates of all leases issued under section 24 of The Land Enactment 1911, for land situated within the State or registration district for which he is appointed, and of all certificates of title issued as hereinafter in this part provided in pursuance of such leases.

For the purposes of this part leases issued under the provisions of the repealed sections 25A and 22A of the Land Enactments 1903, of Perak, Selangor, Negri Sembilan and Pahang, shall be deemed to be leases issued under the provisions of section 24 of the Land Enactment 1911.

28. The provisions of the other parts of this Enactment shall, with the necessary modifications, apply to every such lease as is in this part hereinbefore referred to, in the same manner and to the same extent as if such lease were a grant within the meaning of this Enactment, subject to the following provisos—

(*a*) Where reference is made to "the register," such reference shall be deemed to be the register required to be kept under the last preceding section;

(*b*) The terms "proprietor" and "owner" shall be construed as referring to the person registered as lessee, and the term "lease," with its grammatical variations and cognate expressions, shall be construed as meaning sub-lease;

(*c*) Nothing in this Enactment contained shall operate to vest in any person by transfer, transmission or otherwise howsoever, any interest in the land leased greater than is conveyed by the terms of the lease, or for a period extending beyond that limited by the terms of the lease;

(*d*) Certificates of title, issued in pursuance of the leases referred to in the last preceding section, shall be substantially in the form B contained in the second schedule, and shall be taken by all courts as conclusive evidence that there is vested in the person named therein all such interest in the land leased as is conveyed by the terms of the lease, subject to the conditions and agreements expressed or implied therein, and the title of such person shall not be subject to challenge except on the grounds specified in section 8:

(*e*) The forms contained in the second schedule shall, when used for the purposes of leases referred to in the last preceding section, be subject to such modifications as circumstances may require, or as the Resident may, with the approval of the chief secretary to Government, from time to time prescribe.

PART VI.—*Transfers.*

29. When land is intended to be transferred, the registered proprietor, or if such proprietor is a minor or of unsound mind the guardian, next friend or other person appointed by the Court to act on behalf of the minor or person of unsound mind in the matter, may

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execute a transfer in the form C contained in the second schedule, which transfer shall, for description of the land intended to be dealt with, refer to the grant or certificate of title of such land, or shall give such description as may be sufficient to identify the same, and shall contain an accurate statement of the land intended to be transferred, and a memorandum of all leases and charges to which the same may be subject, and of all rights of way and easements intended to be conveyed, and such transfer, if it be endorsed on the instrument evidencing the title of any transferor, need not be in duplicate.

30 [Am. 1913, s. 2]. [Fi. 1876 (1906), s. 43, Aust. Torr. Syst. 675, adding:] and any memorial so entered, whether before or after the commencement of this Enactment, of a genuine transfer of land by the proprietor thereof, or if such proprietor is a minor or of unsound mind, by the guardian, next friend, or other person appointed by the Court to act on behalf of the minor or person of unsound mind in the matter, to a purchaser, shall in favour of the transferee named in the said memorial have in all respects the same force and effect which by virtue of section 8 appertain to the duplicate certificate of title, in section 8 referred to, in favour of the person therein named as proprietor of the land.

31 [(i): Fi. 1876 (1906), s. 44 Aust. Torr. Syst. 675.]

(ii) Where part only of the land contained in a grant or certificate of title is transferred, the registrar shall apportion the quit-rent or other annual payments payable to the State in respect of such land, and shall enter on the certificate of title, issued by him to the transferee and transferor respectively, the amounts thenceforward payable in respect of the part transferred and the balance, respectively: provided that the sum so payable annually in respect of any sub-division shall in no case be less than fifty cents.

(iii) If either party is dissatisfied with the apportionment made by the registrar, he may request the registrar in writing to refer the question of apportionment to the Court, and the registrar shall thereupon refer the same accordingly.

[32-35: Fi. 1876 (1906), ss. 45-48, Aust. Torr. Syst. 675, 676, 704, substituting "charge" for "mortgage," &c., and omitting reference to chose in action in last section (Fi.).]

PART VII.—*Leases.*

36. When any land is intended to be leased for any term exceeding three years, the proprietor, or [&c., s. 29, *ante* p. 514.] shall execute a lease in the form E contained in the second schedule, and every such instrument shall, for description of the land intended to be dealt with, refer to the grant or certificate of title of the land, or shall give such other description as may be necessary to identify such land: provided always that no lease of charged land shall be valid and binding against the chargee unless such chargee shall have consented in writing to such lease prior to the same being registered, and that no lease for the period above specified shall be valid unless registered.

37. Any lease or agreement for a lease, granted for a term not exceeding three years, shall be valid without registration: provided that no right to purchase the land contained in any such lease or

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agreement shall be valid as against any subsequent purchaser of the land, unless such lease or agreement be registered.

[38, 39: Fi. 1876 (1906), ss. 51, 52, Aust. Torr. Syst. 676, 677, omitting reference to extension in s. 51 (Fi.).]

40. [(i): Fi. 1876 (1906), s. 53 Aust. Torr. Syst. 677.]

(ii) There shall also be implied in any memorandum of lease unless a contrary intention shall therein appear, the following agreement by the lessor—viz., that he will pay all quit-rent which shall become payable to the State during the continuance of the lease, in respect of the property contained in the lease, and keep the lessee indemnified against all claims and demands in respect of such quit-rent or in respect of any charges on such property.

[41, 42: Fi. 1876 (1906), ss. 54, 56, Aust. Torr. Syst. 677, 678, omitting reference to bankruptcy in s. 56 (Fi.).]

PART VIII.—*Charges.*

43. Whenever any land is intended to be charged or made security in favour of any person, the proprietor, or [&c., s. 29, *ante*, p. 514.] shall execute a charge in the form F (i) or F (ii) contained in the second schedule, which must be registered as hereinbefore provided.

44. The chargee, upon default in payment of the principal sum or any part thereof, or of any interest or periodical payment, secured by any charge, may enter into possession of the charged land by receiving the rents and profits thereof, or may distrain upon the occupier or tenant of the said land for the rent then due.

[45-57: Fi. 1876 (1906), ss. 61, 63-69, 71-75, mutatis mutandis, and (since "charge" covers both "mortgage" and "incumbrance") omitting references to "incumbrance'" and "annuity"; Aust. Torr. Syst. 679-681, 704, 705.]

PARTS IX, X.—*Powers of Attorney. Registration Abstract.*

[58-63: Fi. 1876 (1906), ss. 76-81, Aust. Torr. Syst. 682.]

PART XI.—*Transmissions.*

64. Whenever the proprietor of any land shall die, the representative of the deceased proprietor shall, before any dealing with such land, and subject to the provisions of section 81 of the Probate and Administration Enactments 1904, make an application in writing to the registrar of the State or registration district within which the land is situated to be registered as proprietor, and shall produce to the registrar the probate, letters of administration, or certificate of representation, and thereupon the registrar shall enter in the register a memorial of the date of the probate, letters of administration, or certificate of representation, the date and hour of the production of the same to him, the date of the death of such proprietor, when the same can be ascertained, and shall add the words "as representative" after the name of the person to whom such probate, letters of administration, or certificate of representation was granted, and upon such entry being made, the representative shall, subject to the provisions of the Probate and Administration Enactments 1904, be deemed to be

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the proprietor of such land, or such part thereof as shall for the time being remain undisposed of, and the registrar shall note the fact of such registration by memorandum under his hand on the probate, letters of administration, or certificate of representation: provided always that the title of the representative to such land shall relate back, and take effect as from the date of the death of the deceased proprietor.

65. Subject to this Enactment, and to the Probate and Administration Enactments 1904, the land of any deceased proprietor disposed of by his will shall be held by the representative according to the dispositions of such will, but these shall not be registered, nor, subject as aforesaid, shall any person dealing with the said land have any concern with the same.

66. Whenever any charge or lease affecting land shall be transmitted in consequence of the death of the proprietor thereof, the probate, letters of administration, or certificate of representation, accompanied by an application in writing from the representative claiming to be registered as proprietor in respect of such charge or lease, shall be produced to the registrar, who shall thereupon enter in the register, and on the instrument evidencing title to the charge or lease transmitted, the date of the certificate of representation as aforesaid, the date and hour of the production of the same to him, the date of the death of such proprietor, when the same can be ascertained, with such other particulars as he may deem necessary, and upon such entry being made the representative shall be deemed to be the proprietor of such charge or lease, and the registrar shall note the fact of such registration by memorandum under his hand on the certificate of representation.

67. Any person registered as the representative of a deceased person shall hold the land in respect of which he is registered for the purposes to which the same is applicable according to equity and good conscience, and subject to any trusts upon which the deceased proprietor held the same, but for the purpose of any registered dealings with such land he shall, subject to the provisions of the Probate and Administration Enactments 1904, and of this Enactment, be deemed to be the absolute proprietor thereof.

68. No execution, or notice of sale for the recovery of any quit-rent due to the State, shall affect any land until the registrar of the State or of the registration district within which such land is situated shall be served with a copy of warrant of execution or notice of sale, as the case may be, accompanied by a statement signed by any party interested, or by his agent, or by the collector, specifying the land sought to be affected thereby, and shall, after marking upon such copy the time of such service, enter a notice thereof in the register. Such entry shall operate as a caveat against any alienation other than in pursuance of the said warrant or notice of sale, while the same remains in force, and after any land so specified shall have been sold under any such warrant or notice of sale the registrar shall, on receiving a transfer thereof in one of the forms K (i), K (ii), K (iii), K (iv), and K (v), contained in the second schedule, make an entry thereof in the register, and on such entry being made the purchaser shall be deemed the proprietor of such land: provided that until such entry of notice shall have been made as aforesaid no sale or transfer

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under any such warrant or notice of sale shall be valid as against a purchaser for valuable consideration, notwithstanding the purchaser had actual notice of such warrant or notice of sale. Upon production to the registrar of sufficient evidence of the satisfaction of any warrant, a copy whereof shall have been served as aforesaid, or of the payment of the arrear in respect of which the notice of sale, or copy thereof, shall have been served as aforesaid, and of the interest and expenses, he shall cause an entry to be made in the register to that effect, and on such entry such warrant or notice of sale shall be deemed to be satisfied. Every such warrant or notice of sale shall cease to affect any land specified as aforesaid, unless a transfer upon a sale under such warrant or notice of sale shall be registered within six months from the day on which the copy is served.

[69: Fi. 1876 (1906), s. 92, Aust. Torr. Syst. 684.]

PART XII.—*Caveats.*

[70: Fi. 1876 (1906), s. 93, Aust. Torr. Syst. 685, 686. Add at beginning before "may lodge": "of if such proprietor is a minor," &c., as in s. 29, *ante* p. 514. Omit final words after "sustained damage thereby."]

PART XIII.—*Attestation of Instruments.*

71. (i) Every signature to an instrument requiring to be registered, and to a copy of attorney whereof a duplicate or an attested copy is required to be deposited with the registrar, shall be attested by one of the following persons:

(*a*) Within the Federated Malay States:
A magistrate;
A registrar of titles;
A collector of land revenue; or
An advocate and solicitor of the Supreme Court.

(*b*) In the Colony:
A justice of the peace; or
An advocate and solicitor of the Supreme Court of the Colony.

(*c*) In the United Kingdom of Great Britain and Ireland or in any British possession other than the Colony.
A notary public;
A commissioner of the Supreme Court of Judicature empowered to take affidavit in such Court, or
The mayor or recorder or other chief officer of any city or municipal corporation.

(*d*) In any other place:
The British consular officer; or
Any person specially appointed by the chief secretary to Government in that behalf.

(ii) In all cases where an official holding a seal of office shall attest any instrument, he shall authenticate his signature by his official seal.

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PART XIV.—*Special Jurisdiction of Court.*

[72-78: Fi. 1876 (1906), ss. 96-102, Aust. Torr. Syst. 686-688.]

PART XV.—*Special Powers and Duties of Registrar.*

[79: Fi. 1876 (1906), s. 108, Aust. Torr. Syst. 689-691. In clause (i) "eight acres" has been substituted for "eighty acres" in clause 9 of the Fiji statute.]

PART XVI.—*Miscellaneous Provisions.*

80. A lien may be created by deposit of the grant or certificate of title. The holder shall have the power at any time during the existence of his lien to enter a caveat, in manner set forth in part XII hereof, to prevent all dealing with the land, and when he has obtained a judgment of the Court for the actual sum due, he shall be entitled to apply for and obtain an immediate order of sale of the land.

[81-87: Fi. 1876 (1906), ss. 110-116, Aust. Torr. Syst. 691-693.]

88. Nothing contained in this Enactment shall take away or affect the jurisdiction of the Court on the ground of actual fraud.

[89, 90: Fi. 1876 (1906), ss. 120, 121, Aust. Torr. Syst. 693.]

PART XVII.—*Penalties.*

. . . . . .

FIRST SCHEDULE.

Enactments Repealed.

[These consist of statutes of the four States—Selangor, Perak, Negri Sembilan, and Pahang: Registration of Titles statutes of 1891, 1897, 1898, and 1909; s. 81 (vii) of the Probate and Administration Enactments 1904.]

SECOND SCHEDULE.

Forms.

[The forms correspond generally with those in the schedule to the Fiji statute.]

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ONTARIO.

LAND TITLES ACT

(R. S. 1914, c. 126).

NOTE.—This statute (a revising or consolidating Act, with some subsequent amendments here embodied) is for the most part an adaptation of the English Land Transfer Act 1875, with some provisions taken from the amending Act of 1897. Occasionally the English enactments are reproduced almost literally, and these are then referred to as printed in Ownership and Incumbrance of Registered Land; but in many instances local alterations have been so introduced as to make mere reference to the English Act misleading. The sections altogether omitted mostly refer to matters of procedure. Where reference is made to sections of the English Act, it must be borne in mind that the words "owner" and "master of titles" are used in the Ontario statute where the English statute has "proprietor" and "registrar."

An Act to simplify titles and to facilitate the transfer of land.

. . . .

2. This Act shall, subject to section 146, apply to the county of York, including the city of Toronto, the county of Elgin, including the city of St. Thomas, the county of Ontario, the city of Ottawa and the county of Carleton, and to provisional judicial districts only, and the land registries heretofore established for the said counties and districts are hereby continued.

3. In this Act

. . . . . .

(*d*) "Owner" shall mean owner in fee simple.

. . . . .

(*f*) "Proper master of titles" shall mean the master of titles or local master in whose office the land affected or intended to be affected by any proceeding, instrument or document is or may be registered.

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PART I. *Entry of land on register of title.*

. . . .

6. (1) Any person entitled for his own benefit at law or in equity to an estate in fee simple in land, whether or not subject to incumbrances, or any person capable of disposing for his own benefit by way of sale of an estate in fee simple in land, whether or not subject to incumbrances, may apply to the proper master of titles to be registered under this Act, or to have registered in his stead any nominee as owner of such land, with an absolute, qualified or possessory title, as the case may be.

(2) Any person who has contracted to buy for his own benefit an estate in fee simple in land, whether or not subject to incumbrances, may also apply if the vendor consents to the application.

(3) The attorney-general for Canada, or the attorney-general for Ontario, may apply in like manner in respect to the title of the Crown to any land; and the practice and procedure upon the application shall be the same as in ordinary cases.

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Trustees and mortgagees.

7. (1) Any person holding land on trust for sale, and any trustee, mortgagee, or other person having a power of selling land, may authorize the purchaser to make an application to be registered as owner with any title with which an owner is authorized to be registered, and may consent to the performance of the contract being conditional on his being so registered; or any of such persons, except a mortgagee, may himself apply to be registered as such owner with the consent of the persons (if any) whose consent is required to the exercise by the applicant of his trust or power of sale.

(2) A mortgagee, having a power of selling land, may apply to have the mortgagor or other person owning the equity of redemption registered as owner with any such title.

(3) The amount of all costs, charges, and expenses properly incurred by such person, in or about the application, shall be ascertained and declared by the proper master of titles, and shall be deemed to be costs, charges, and expenses properly incurred by such person in the execution of his trust or in pursuance of his power; and he may retain or reimburse the same to himself out of any money coming to him under the trust or power, and he shall not be liable to any account in respect thereof.

Part owners.

8. (1) Any two or more persons entitled concurrently or successively, or partly in one mode and partly in another, to such estates, rights, or interests in land as together make up such an estate as would, if vested in one person, entitle him to be registered as owner of the land, may, subject as in this Act mentioned with respect to the number of persons to be registered in respect of the same land, apply to the proper master of titles to be registered as joint owners, in the same manner and with the same incidents, so far as circumstances admit, in and with which it is in this Act declared that an individual owner may be registered.

(2) Where several persons are so registered as owners, the entry may, if the parties so desire, define the estates, rights and interests, other than trust estates, rights and interests, to which the owners are respectively entitled, and such entry may be made either upon first registration, or subsequently in case the estates, rights or interests so arise.

(3) Persons entitled to several estates, as mentioned in sub-section 1, or owners who are tenants in common or joint tenants, shall be entitled to take out one certificate in respect of the whole estate, or each person may, when the extent of his interest is defined, take out a certificate in respect of his own estate; but when a certificate for the whole is outstanding no separate certificate shall be issued till the outstanding certificate is returned and cancelled.

Absolute titles.

9. Where an absolute title is required, the applicant or his nominee shall not be registered as owner of the fee simple unless and until the title is approved by the proper master of titles.

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[10: Eng. 1875, s. 7, Own. & Inc. 287. The concluding words are: "estates and interests of his Majesty, which are within the legislative jurisdiction of Ontario."]

Possessory titles.

11. Where a possessory title only is required, the applicant or his nominee may be registered as owner of the fee simple on giving such evidence of title, and serving such notices, if any, as may be prescribed.

[12: Eng. 1875, s. 8, Own. & Inc. 288.]

Qualified titles.

[13. (1, 2, 3): Eng. 1875, s. 9, Own. & Inc. 288.]

(4) Where the existence of any easement is proved the master may, if he thinks fit, enter notice thereof on the register.

(5) Where title is shewn to any easement appurtenant to the land being registered, the same may be stated in the entry and certificate of ownership.

Certificate of ownership.

14. On the entry of the name of the first registered owner of freehold land on the register, the proper master of titles shall, if required by the owner, deliver to him a certificate, in the prescribed form, in this Act called a certificate of ownership, which shall state whether the title of the owner therein mentioned is absolute, qualified, or possessory.

15. (1) A certificate by the proper master of titles of the first registration of an owner under this Act shall be registered in the registry division in which the land is situate; and thereafter the Registry Act shall cease to apply to such land.

(2) The certificate, besides describing the land, shall state the date of the first registration, the number of the parcel and the register in which the land is registered: and the registrar shall in his abstract index enter the number of the parcel and the register as given in the certificate.

PART II. *Leasehold land.*

16. [(1-4): Eng. 1875, s. 11 (as originally enacted), Own. & Inc. 289, 290.]

(5) Section 7 shall apply to leasehold as well as to freehold land.

[17-21: Eng. 1875, ss. 12-16 (as originally enacted), Own. & Inc. 290-292. The concluding words of s. 18 are: "estates and interests of his Majesty, which are within the legislative jurisdiction of Ontario."]

PART III. *Registration, how effected.*

22. [(*a-c*): Eng. 1875, s. 17 (1-3), Own. & Inc. 295.]

(*d*) It shall not be necessary to produce any evidence which, by the Vendors and Purchasers Act is dispensed with as between vendor and purchaser, or to produce or account

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for the originals of any registered deeds, documents, or instruments, unless the master otherwise directs;

(*e*) The master may receive and act upon any evidence which is received in court on a question of title, or any evidence which the practice of conveyancers authorizes to be received on an investigation of a title out of court, or any other evidence, whether the same is or is not receivable or sufficient in point of strict law, or according to the practice of conveyancers, if the same satisfies him of the truth of the facts intended to be made out thereby;

(*f*) The master may refer to and act upon, not only the evidence adduced before him in the proceeding in which such evidence is adduced, but also any evidence adduced before him in any other proceeding wherein the facts to which such evidence relates were or are in question.

. . . . . .

24. (1) All registered land, unless the contrary is expressed on the register, shall be subject to such of the following liabilities, rights, and interests as for the time being may be subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed incumbrances within the meaning of this Act;

(*a*) Provincial taxes and succession duty and municipal taxes, charges, rates or assessments, and school or water rates;

(*b*) Any right of way, water-course, and right of water, and other easements;

(*c*) Any title or lien which, by possession or improvements the owner or person interested in any adjoining land has acquired to or in respect of the registered land;

(*d*) Any lease or agreement for a lease, for a period yet to run which does not exceed three years, where there is actual occupation under it;

(*e*) Any right of the wife or husband of the person registered as owner to dower or curtesy, as the case may be, in case of surviving such owner;

(*f*) A mechanic's lien where the time limited for the registration thereof has not expired;

(*g*) Any right of expropriation, access, or user conferred by statute, and any other right conferred upon or reserved to the Crown by any statute.

(*h*) Any public highway.

(2) The description of the land in the entry of ownership shall not, as against adjoining owners, be conclusive as to the boundaries or extent thereof.

(3) Where a license under the Crown Timber Act, or any statute for which that Act is substituted, has been or shall be granted, and the land is registered under this Act, the same shall be deemed to have been, and to be subject to the rights of the licensee or his assigns for the current license year under the license, and to the rights of his Majesty in the pine trees under the Public Lands Act, or any statute for which that Act is substituted, without the fact of such land being so subject being expressed in the entry in the register, or in the certificate of ownership.

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25. (1) If the applicant desires the certificate to declare the title to be free from the first five of the particulars mentioned in sub-section 1 of the next preceding section, or any of them, his application shall so state, and the investigation shall proceed accordingly.

(2-4) Where the applicant desires that the land shall be registered free from any public highway, a notice so stating shall be published [in newspapers, and served on official persons, and the question may be litigated.]

(5) The master pending the final decision of the question may register the applicant as owner, subject to any public highway, and upon the final determination of the question if it is determined in favour of the applicant, the entry and certificate of ownership shall be varied in accordance therewith.

Mortgages existing at first registration.

26. (1) Where land is registered subject to mortgages existing thereon at the time of the first registration, the mortgages shall be noted in the register in the same order as they are registered in the registry office if such mortgages have been so registered, or the dates of the respective registrations thereof shall be stated, but this shall not be taken as an affirmation that such mortgages rank in the order in which they were registered, or in the order in which they are noted.

(2) Abstracts of all instruments dealing with such mortgages shall thereafter be entered in the register, and the entry thereof shall be deemed the registration of the instrument, and the rights of the parties interested or claiming to be interested in any such mortgage so far as it affects land under this Act shall, subject to sections 10 to 13 and 42 to 45, be decided under the registry law, as if the registrations in the office of land titles had been made under the Registry Act.

Determination of incumbrances or leases existing at first registration.

27. [(1): Eng. 1875, s. 19 (as originally enacted), Own. & Inc. 300, adding "and thereupon the incumbrance shall cease."]

(2) On the requisition or certificate of a mortgagee whose mortgage was entered on the register on the first registration of the land, or the registered assignee thereof, or of the personal representative of such mortgagee or assignee, authorizing or certifying the discharge of the whole or any part of the land therefrom, or the discharge of the whole or any part of the money thereby secured, the master may note on the register the discharge of such land from the mortgage, or the discharge of such part of the money, and thereupon, as to the land or money discharged, the incumbrance shall cease.

(3) The death of the person who signed the requisition or certificate shall not revoke or otherwise affect the same.

28. The proper master of titles, on proof to his satisfaction of the determination of any lease of registered land existing at the first registration, shall note in the prescribed manner on the register the determination of such lease.

Adverse possession as against registered owner.

[29: Eng. 1875, s. 21 (now repealed), Own. & Inc. 302.]

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PART IV. *Transfer and charge of registered land.*

Charge of registered land.

30. (1) Every registered owner may, in the prescribed manner, charge the land with the payment at an appointed time of any principal sum of money, either with or without interest, or as security for any other purpose, and with or without a power of sale.

(2) The charge shall be completed by the proper master of titles entering on the register the person in whose favour the charge is made as the owner of the charge, stating the amount of the principal sum which the charge secures, with the rate of interest, and the periods of payment, or the other purpose for which the charge is given.

(3) Where the charge contains a power of sale, that fact shall be stated, but the particulars need not be set out in the register, nor shall it be necessary to set forth incidental matters which may be expressly charged, such as costs of inspection, or of abortive attempts to sell and the like.

(4) The charge, when registered, shall confer upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the incumbrances and qualifications to which such interest is subject, but free from any unregistered interests in the land.

(5) The master shall also, if required, deliver to the owner of the charge a certificate of charge in the prescribed form.

(6) The provisions of section 74 of the Registry Act shall apply to the charge, as if it was a registered mortgage.

Registry Act (R. S. 1914, c. 124), s. 74. Every registered mortgage shall, as against the mortgagor, his heirs, executors, administrators, assigns, and every other person claiming by, through or under him, be a security upon the land comprised therein to the extent of the money or money's worth actually advanced or supplied under the mortgage, not exceeding the amount for which such mortgage is expressed to be a security, notwithstanding that the money or money's worth, or some part thereof, was advanced or supplied after the registration of a conveyance, mortgage, or other instrument affecting the mortgaged lands, executed by the mortgagor, his heirs, executors or administrators, and registered subsequently to such first-mentioned mortgage, unless before advancing or supplying such money or money's worth the mortgagee in such first-mentioned mortgage had actual notice of the execution and registration of such conveyance, mortgage or other instrument; and the registration of such conveyance, mortgage, or other instrument after the registration of such first-mentioned mortgage shall not constitute such actual notice.

31. (1) Where a registered charge is created, there shall be implied on the part of the registered owner at the time of the creation of the charge, his heirs, executors and administrators, unless there is an entry on the register negativing the implication, covenants with the registered owner for the time being of the charge:

(*a*) To pay the principal sum charged, and interest (if any) thereon, at the appointed time and rate; and all taxes, rates, charges, rents, statute labour, or other impositions theretofore or thereafter imposed or charged on the land, and that in case of default all payments made by the

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owner of the charge may be added to the principal sum and bear interest;

(*b*) If the principal sum or any part thereof is unpaid at the appointed time, to pay interest half-yearly at the appointed rate on so much of the principal sum as for the time being remains unpaid.

(2) Where a charge, whether or not under seal, is expressed to be made in pursuance of the Short Forms of Mortgages Act, or refers thereto, and contains any form of words contained in clauses numbered 1, 2, 3, 7, 8, 12, 14, 15 or 16, of column one of schedule B to that Act, whether expressed in the first or third person, such words shall have the same meaning and effect as the words under the corresponding number in column two in that schedule: and the provisions of that Act shall apply to the charge.

[32, 33: Eng. 1875. ss. 24, 25, Own. & Inc. 307, 308.]

34. Subject to any entry to the contrary on the register, the registered owner of a registered charge may enforce it by foreclosure or sale, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption.

35. Subject to any entry to the contrary on the register, the registered owner of a registered charge with a power of sale, in accordance with the terms of the power, may sell and transfer the interest in the land which is the subject of the charge, or any part thereof, in the same manner as if he were the registered owner of the land to the extent of such interest therein.

36. Subject to any entry to the contrary on the register, registered charges on the same land shall as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created.

37. (1) The proper master of titles shall, on the requisition of the registered owner of any land and on due proof of the satisfaction of a charge thereon, or may on the requisition of the registered owner of a charge or of his personal representative, or on his certificate of the satisfaction thereof, note on the register in the prescribed manner, by cancelling the original entry or otherwise, the cessation of the charge; and thereupon the charge shall cease.

(2) The master may in like manner and with the like effect note the cessation of any other incumbrance.

(3) On the requisition or certificate of the registered owner of a charge, or of the personal representative of such owner, authorizing or certifying the discharge of any part of the land therefrom, or the discharge of any part of the money thereby secured, the master may note on the register the discharge of such land from the charge, or the discharge of such part of the money, and thereupon as to the land or money discharged the charge shall cease.

(4) The death of the person who signed the requisition or certificate shall not revoke or otherwise affect the same.

Transfers after land is brought under this Act.

[38: Eng. 1875, s. 29, Own. & Inc. 313, substituting "certificate of ownership" for "land certificate."]

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39. (1) Any person who is entitled to have a transfer or charge entered on the register shall have the right to require the holder of the certificate of ownership, if any is outstanding, to produce the certificate to the proper master of titles, or to deliver it to such person for production, for the purpose of having all proper entries or alterations made thereon by the master, or for cancellation when the certificate has become effete.

(2) A person entitled to have a cessation of a charge entered shall have the right to have an outstanding certificate of ownership of the charge produced in like manner, in order that it may be cancelled.

40. [Am. 1914, s. 2]. (1) Where upon an application for the registration of a charge, or of a transfer of any land or charge, the proper master of titles considers it expedient to require the production of the certificate of ownership, either for the purpose of identifying the person dealing with the land or charge, or for cancellation when the same ought to be cancelled, or for any other purpose, he may do so, and may decline to enter the charge or transfer on the register until the certificate has been produced, and if the certificate is not produced within such time as the master limits, he may return the transfer or charge.

(2) Where a master declines to register an instrument on account of any deficiency or irregularity therein, or for want of evidence deemed by him to be requisite, or for any other reason, and the person desiring registration, after having been given such time as shall in the master's opinion afford a reasonable opportunity to comply with the master's requirements, fails to do so and fails to successfully appeal from the master's decision, the master may proceed with other registrations affecting the land, as if no such instrument had been presented for registration, and he shall not be affected with notice of the contents of any instrument which he has declined to register as aforesaid.

41. Where registered land is transferred to trustees under the Religious Institutions Act, the trustees shall be registered as owners in the usual manner, and by their corporate name, without setting out the purposes or trusts on which the land is held, but a note shall be made by the proper master of titles that the land is only to be transferred or charged in accordance with the provisions of that Act.

42. A transfer for valuable consideration of land registered with an absolute title, when registered, shall confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges and appurtenances belonging or appurtenant thereto, subject to:

(*a*) The incumbrances, if any, entered or noted on the register; and

(*b*) Such liabilities, rights, and interests (if any) as are declared for the purposes of the Act not to be incumbrances, unless the contrary is expressed on the register, and

As to such rights, privileges and appurtenances, subject also to any qualification, limitation, or incumbrance to which the same are expressed to be subject in the register, or where such rights, privileges, and appurtenances are not registered, then subject to any qualification,

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limitation, or incumbrance to which the same are subject at the time of the transfer; but free from all other estates and interests whatsoever, including estates and interests of his Majesty, which are within the legislative jurisdiction of Ontario.

[43-45: Eng. 1875, ss. 31-33, Own. & Inc. 314, as originally enacted.]

Claims for dower.

46. (1) Where it is claimed that registered land is free from dower, on account of the land being held in trust, or for some reason other than the wife's release of her dower by an instrument which can be produced and registered, and evidence to that effect which appears satisfactory is produced before the proper master of titles, he may issue a notice requiring the wife to support her right if she claims to be entitled to dower in the land; and if she fails to do so the master may enter on the register a memorandum that the land is free from dower, and such entry shall, unless reversed on appeal, be a bar to any claim by such wife; and no appeal shall lie, unless the wife claims her right of dower before the master.

(2) This section shall also apply to the widow of a former owner.

47. Where registered land is transferred subject to a charge, or where the registered owner of land which is subject to a charge subsequently marries, the wife of the transferee or owner shall have the same rights in respect of dower, as she would have had if the legal estate had been transferred by an ordinary mortgage, and no others.

[48-53: Eng. 1875, ss. 34-39, Own. & Inc. 315-317, as originally enacted. S. 49 differs slightly from Eng. s. 35: the transfer, "when registered, shall vest in the transferee the land transferred for all the leasehold estate described in the registered lease relating to such land and then unexpired, with," &c.; the concluding words are: "his Majesty which are within the legislative jurisdiction of Ontario."]

Transfer of charges.

54. (1) The registered owner of a charge may, in the prescribed manner, transfer such charge to another person as owner.

(2) The transfer shall be completed by the proper master of titles entering on the register the transferee as owner of the charge transferred.

(3) The transfer, when registered, shall confer upon the transferee the ownership of the charge, free from any unregistered interests therein, and the transfer of part of the sum secured by a charge shall confer upon the transferee the ownership of such part, free from any unregistered interests therein.

(4) Every transfer of a charge shall be subject to the state of account upon the charge between the chargor and the chargee.

(5) The master shall also, if required, deliver to the transferee a fresh certificate of charge.

(6) The transferor shall be deemed to remain owner of such charge, until the name of the transferee is entered on the register in respect thereof.

(7) The registered owner of a charge may transfer a part of the sum secured by the charge, and the part so transferred may be given

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priority over the remaining part, or may be deferred, or may continue to rank equally with it, as may be stated in the transfer.

Time of registration.

55. The day, hour, and minute of the receipt of each instrument and copy of writ shall be noted thereon, and for the purpose of priority between chargees, transferees and others, the time of the receipt shall be deemed the time of registration.

Transmission of land and charges on owner's death.

[56, 57: Eng. 1875, ss. 41, 42, Own. & Inc. 333.]

58 [1918, s. 2]. Where two or more persons holding as tenants in common have been entered as owners of any land or charge, and one of them dies, his personal representative, or such other person as may be entitled to the share of the deceased, may apply to be entered as owner with the survivor or survivors.

[59, 60: Eng. 1875, ss. 46, 47, Own. & Inc. 334, 335, omitting references to bankruptcy.]

61. Where an heir or devisee applies to be entered as owner of any registered land which has vested in him under the Devolution of Estates Act, the proper master of titles shall made such entry, without reference to the liability of the land for debts, except under executions, copies of which have been duly lodged; and the liability under that Act of such land, or any transferor thereof, shall be determined as if such land had not been registered under this Act.

Executions and sale thereunder.

62. (1) The sheriff, or other officer to whom the same is directed, forthwith after the delivery to him of any execution or other writ, or renewal thereof, affecting registered land, upon written request of the party by whom such execution or other writ was sued out or renewed, or of his solicitor, but not otherwise, shall deliver or transmit by registered post to the proper master of titles a copy of the writ certified under his hand; and no registered land shall be bound by any such writ until such copy has been received by the master; and after the receipt by him of the copy, no transfer by the execution debtor shall be effectual, except subject to the rights of the execution creditor under the writ.

(2) The master shall keep a book in the prescribed form, in which shall be entered a record of all writs, copies of which are received by him from the sheriff or other officer.

(3) No sale or transfer under any such writ shall be valid as against a person purchasing for valuable consideration before such entry is made, notwithstanding that the purchaser may have had notice of the writ.

(4) Upon production to the master of sufficient evidence of the satisfaction of any such writ, he shall cause an entry to be made in the book to that effect, and on such entry the writ shall be deemed to be satisfied.

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(5) Every writ and renewal of a writ shall be presumed to have been spent, and the delivery or transmission of a copy thereof shall cease to have effect, at the expiration of the writ or renewal as appearing on the copy transmitted; but if there has been a sufficient commencement of the execution to enable it to be completed by the sale and conveyance of the land under the writ, and the same has not been completely executed, the sheriff or officer shall, or the execution creditor may, at any time within one month before the expiration of the writ or renewal as so appearing, file with the master a certificate of the sheriff or officer stating that fact, and such certificate shall be noted at the entry of the writ in the book, and the writ shall continue in force for a further period of one year from the filing of the certificate, when it shall cease to have effect, unless another similar certificate is filed, which shall operate in like manner.

(6) Where an execution or other writ is issued against the registered owner under a different name from that under which he is registered, the writ shall have no effect under this Act, unless the person who sues out the writ, or his solicitor, gives a notice to the master, stating the name under which the execution debtor is registered, and otherwise in the form or to the effect prescribed, or unless a like notice is written upon the copy of the writ.

(7) The sheriff or other officer shall be entitled to a fee of fifty cents for each copy of writ or certificate transmitted by him.

63. Where a transferor or transferee of land, or maker or owner of a charge, claims that a writ apparently affecting land does not affect the land or charge, he shall produce such evidence thereof as the proper master of titles may consider necessary, and the master may require all parties interested to be notified of the application to register freed from the writ, and may himself decide the question, or may direct an issue to be tried or a case to be stated, and may make such order as to costs as he deems just.

64. (1) The seizure under execution or other process of a mortgage or charge, or of leasehold land, registered under this Act, shall not take effect until a certificate of the sheriff or other officer, that he has taken such mortgage, charge, or leasehold land under such process against the registered owner thereof, is lodged with the proper master of titles.

(2) The certificate shall state the number of the parcel under which the land affected is registered, and the name of the owner, and shall be noted by the master in the register.

(3) This section shall not apply where the proceedings prescribed by section 25 of the Execution Act have been taken with respect to a mortgage or charge.

65. Where any registered freehold or leasehold land is sold under execution or other process, the proper master of titles, upon the production to him of the transfer of the same by the sheriff or other officer in the prescribed form, with proof of the due execution thereof, shall cause a notice to be mailed to the proper post-office address of the person whose interest has been sold; and after the expiration of two weeks from the mailing of the notice, and if no other person has become entitled meanwhile for want of entry of the writ or otherwise, the master shall register the purchaser as owner, and shall, if required, issue to him a certificate of ownership in the prescribed form.

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Sale for taxes.

66 [1914, s. 2]. (1) Where land is sold for taxes, the purchaser may at any time after the sale lodge a caution against the transfer of the land; and upon the completion of the time allowed by law for redemption, and upon the production of the transfer of the land in the prescribed form, with proof of the due execution thereof by the proper officer, the proper master of titles shall cause a notice to be mailed to the proper post-office address of the persons who appear upon the register to be interested in the land, or served upon them, or any of them, personally; and after the expiration of three months from the mailing or service of the notice, shall, if no other person has become entitled by priority of registration, register the purchaser at the sale as owner of the land, with an absolute title; and shall, if required, issue to him a certificate of ownership in the prescribed form, unless the registration is in the meantime stayed by order of the Court, and in that case the registration shall not be made, nor shall the certificate be issued, except in accordance with the order and direction of the Court.

(2) If any person appearing upon the register to be interested in the land acquired such interest after the tax sale, the notice to be given to him shall require him, if he objects to the registration of the tax purchaser as owner, or if having a charge only he claims priority for such charge, to file his objection or claim verified by affidavit with the proper master before the expiration of one month from the mailing or other service of the notice, and subject to section 140, such master shall hear and determine such objection or claim upon notice to the parties interested, and registration shall be made in accordance with the final determination of the matter.

(3) Where a tax purchaser fails to lodge a caution, or to lodge his deed for registration, prior to the registration of the title of a purchaser or chargee, claiming from or through the person who was the registered owner at the time of the tax sale for valuable consideration, and without actual notice of the tax sale, he shall lose his priority.

(4) Where it is made to appear to the master that the purchaser has so dealt with the land that a mechanic's lien has, or probably has, attached thereto subsequent to the sale, and a claim of lien has been registered against the land, the master may register the purchaser's title as subject to the claim of lien.

Cessation of mechanics' liens.

67. On its appearing to the satisfaction of the proper master of titles that a lien under the Mechanics' and Wage Earners' Lien Act has ceased to exist, the master may make an entry accordingly, or an entry cancelling the claim; and the land affected shall thereby be released from the claim.

PART V. *Other dealings with registered land.*

Registered owner only may make registered disposition.

68. (1) No person other than the registered owner shall be entitled to transfer or charge registered freehold or leasehold land by a registered disposition.

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(2) Subject to the maintenance of the estate and right of such owner, any person, having a sufficient estate or interest in the land, may create estates, rights, interests and equities, in the same manner as he might do if the land were not registered.

(3) Any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered owner, by entering on the register such notices, cautions, inhibitions, or other restrictions as are authorized by this Act.

(4) No person other than the registered owner thereof shall be entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such owner, unregistered interests in a registered charge may be created in the same manner, and with the same incidents, so far as the difference of the subject matter admits, in and with which unregistered estates and interests may be created in registered land.

Right to registration.

69. (1) Every transfer or charge signed by a registered owner, or others claiming by transfer through or under him, purporting to transfer or charge freehold or leasehold land, or an interest therein, capable of being registered, or purporting to transfer a charge, shall, until cut out by a conflicting registration, confer upon the person intended to take under such transfer or charge a right to be registered as the owner of such land or charge, and where a person applies to be registered under this section, the proper master of titles may either forthwith, or after requiring such notices to be given as he deems expedient, register such applicant as owner, subject to such incumbrances (if any) as the condition of the title requires, notwithstanding that the transfer or charge has been executed or bears date prior to the entry of such transferor or chargor as the owner of the land or charge.

(2) Any person claiming to be entitled to freehold or leasehold land, or to an interest therein, capable of being registered, or to a charge, as devisee, heir, executor or administrator of a person who might have been registered under sub-section 1, or any person claiming through or under such devisee, heir, executor or administrator, may apply to be registered as owner of such land, interest or charge, and if no conflicting registration has been made, may be so registered subject to the provisions of this section.

(3) On registering the applicant, the master shall, so far as practicable, enter on the register short particulars of every instrument or other title under which the right is conferred, as if such instrument had been duly presented for registration, or application for entry of transmission had been made in the proper order of time, and as a preliminary step to the registration of the applicant, may enter any intermediate transferee, heir, executor or administrator, as registered owner, where that method is more convenient.

(4) No application by a person claiming through or under a deceased person shall be allowed, unless all the persons entitled to the whole of the estate of the deceased in the land are to be entered as owners.

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(5) The master may in like manner enter as owner of freehold or leasehold land, or of a charge, any person who is entitled to such land or charge through the death of the owner, although the deceased had not been registered as owner, or any person who is entitled by virtue of the exercise of any power conferred by a statute, will, deed, or other instrument, whether the person so entitled claims directly from the deceased, or directly under the power, or through any other person entitled by virtue of the death or power, or through a succession of transfers or transmissions.

(6) Where under an order of court any freehold or leasehold land, or a charge, is vested in any person, the master shall on due proof of the order make such entries in the register as are necessary to give effect thereto, but if any person whose estate is affected by the order is not shewn by the order to be a party to the cause or matter in which the order was made, the applicant shall furnish such evidence as is requisite to shew that he is bound thereby.

(7) Where any street, road, or lane laid out on a plan registered in a land titles office has become a public highway, and has thereby become vested in a municipal corporation, the corporation may apply to the proper master to be entered as the owner thereof.

(8) Where a highway or part of it has been closed by the action of a municipal council, and such highway or part of it has been transferred by the municipal corporation without the corporation having been entered as owner of it, the transferee may apply to be entered as owner of the highway or part of it transferred to him, and upon due proof of the facts the master may enter such transferee as owner.

Notice of lease.

70. (1) Any lessee or other person entitled to or interested in a lease or agreement for a lease of registered land, where the term is for a life or lives, or is determinable on a life or lives, or where the period of the lease or agreement yet to run is three years or upwards, or where the occupation is not in accordance with such lease or agreement, may apply to the proper master of titles to register notice of such lease or agreement in the prescribed manner.

(2) Where the lease is by the registered owner of the land, the master may without notice to him enter on the register such notice thereof as he deems necessary.

(3) Where the lease is not by the registered owner but his title appears to be subject thereto, or in the case of an agreement for a lease, the master upon notice to such owner may enter notice of the lease or agreement on the register.

(4) The applicant shall deliver to the master the original lease or agreement, or a copy thereof; and if the application is granted the master shall make a note on the register identifying the lease or agreement or copy so deposited, and the lease or agreement or copy so deposited shall be deemed to be the instrument of which notice is given.

(5) If the registered owner concurs in a registration under sub-section 2 or sub-section 3, notice may be entered in such manner as may be agreed upon.

(6) When so registered every registered owner of the land, and every person deriving title through him, excepting owners of incum-

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brances registered prior to the registration of such notice, shall be deemed to be affected with notice of the lease or agreement, as being an incumbrance on the land in respect of which the notice is entered.

(7) Where notice of such lease or agreement has been registered the master, on proof to his satisfaction of the determination of the lease or agreement, shall in the prescribed manner note the determination on the register.

(8) Where a notice of a lease, or of an agreement for a lease, has been registered under this section, a transferee or a chargee of the lease or agreement may apply to have a notice of his transfer or charge entered on the register.

(9) Unless the transferee or chargee has actual notice of a prior transfer or charge, a transfer or charge in respect of which a notice has been entered, shall take priority of one of which notice has not been entered.

Notice of estates in dower or by the curtesy.

[71: Eng. 1875, s. 52, Own. & Inc. 344.]

Caution against registered dealings.

72 [Am. 1918, s. 3]. (1) Any person interested in any way in any land or charge registered in the name of any other person, may apply for the registration of a caution with the proper master of titles, to the effect that no dealings with such land or charge be had on the part of the registered owner, or other named person who is shown to have an interest in the land, until notice has been served upon the cautioner.

[(2) (3): Eng. 1875, s. 53, pars. 2, 3, Own. & Inc. 344, 345.]

(4) Every caution founded upon an execution, or upon an allegation that a transfer, charge, or other dealing is fraudulent, shall be renewed before the expiration of five years from the date of lodging the same, otherwise it shall cease to have effect.

73 [Am. 1918, s. 4]. (1), (2), (3) After any such caution has been registered the proper master of titles shall not [Eng. 1875, s. 54, Own. & Inc. 345.]

(4) A notice to a cautioner shall not be required where the dealing proposed to be registered is under the authority of a judgment or order of court in a suit or proceeding to which the cautioner is a party, or where such dealing is under a power of sale contained in a charge or mortgage which is prior to the title under which the cautioner claims, and the cautioner has been served with a notice of the proposed exercise of the power of sale, and the caution is not in respect of the exercise of the power of sale, or where the dealing is of such a nature that it cannot detrimentally affect the interest of the cautioner as claimed in the affidavit filed with his caution, or where the transferee, chargee, or other person desiring the registration of the dealing is willing that the same should be registered subject to the continuance of the caution, and the master thinks fit so to register it. Where a caution is continued such continuance shall prevent further registration of dealings by the registered owner until after notice to the cautioner, unless as in this section provided.

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(4A) Where a caution only affects part of the land dealt with by the transfer, charge or other instrument, the master may upon the application in writing of the person desiring registration, or his solicitor, register the dealing as to the land not affected by the caution, and may subsequently after notice to the cautioner, or with his consent, register the dealing as to the remainder of the land dealt with by the instrument, or any part thereof. The certificate of registration on the instrument shall shew that the registration made in the first instance covers only part of the land embraced in it.

(5) The master, upon receiving the consent of the cautioner to the registration of a dealing, may discharge the caution, unless the consent provides for its continuance, or he may dicharge the caution as to the land or charge to which the dealing applies, but he shall not do so where from the nature of the dealing he is of opinion that the continuance of the caution is contemplated.

74. (1) Where the registered owner of any freehold or leasehold land has executed a transfer or a charge thereof, but claims that on account of special circumstances shown by affidavit the transferee or chargee should not be registered without notice to the registered owner, the proper master of titles may permit the registration of a caution by the registered owner.

(2) The registration of such caution shall stay the registration of the transfer, until such notice has been served on the cautioner in accordance with the provisions of section 73.

75. [Eng. 1875, s. 55, Own. & Inc. 345, adding:] or may, instead of taking the security, register such dealing subject to the caution, on any condition which he thinks fit to impose as to security or otherwise, or make such other order as he deems just.

76. A second caution by the same cautioner, or any other person in respect of the same matter, shall not be lodged, or if lodged shall not be entered, or have any effect without the special permission of the proper master of titles, which may be given either upon terms or without terms, as he may think proper.

Sale of standing timber.

77. Where timber standing upon registered land is sold under an agreement in writing, the purchaser, instead of entering a caution, may deposit the agreement with the proper master of titles, and the master, upon proof of the due execution thereof by the owner, shall register the same as an incumbrance upon the land, by entering a memorandum upon the register referring to the instrument and giving shortly the effect thereof.

Inhibition against registered dealings.

Power of registered owner to impose restrictions.

[78, 79: Eng. 1875, ss. 57-59, as amended, Own. & Inc. 345-347.]

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PART VI. *Supplemental provisions.*

Notice of registered instruments.

80. No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments other than those mentioned in the existing register of title of the parcel of land, or which have been duly entered in the books of the office kept for the entry of instruments received, or are in course of entry.

Caution against entry of land on register.

81 [Am. 1918, s. 5]. (1) Any person, having or claiming such an interest in any unregistered land as entitles him to object to any disposition thereof being made without his consent, may apply for the registration of a caution with the proper master of titles to the effect that the cautioner is entitled to notice in the prescribed form, and to be served in the prescribed manner, of any application that may be made for the registration of such land.

(2) Every caution under this section shall be renewed before the expiration of five years from the date of lodging the same, otherwise it shall cease to have effect.

(3) No caution registered under this section in respect of any unpatented land shall be of any validity, unless the description contained therein specifies the land in accordance with the description subsequently contained in the patent, or describes the same in such manner that the master may know that the description in the caution is intended to affect the land described in the patent.

Cautions as to actions pending.

83 [Am. 1918, s. 6]. After a caution has been registered in respect tered, but any party to an action, or his solicitor, or any person claiming to be interested in the action, may lodge a caution subject to the same conditions as in other cases.

General provisions as to cautions.

83. [Am. 1918, s. 6]. After a caution has been registered in respect of any unregistered land, and while the same is in force, registration shall not be made of such land until notice has been served on the cautioner to appear and oppose such registration, and until the prescribed time has elapsed after the date of the service of such notice, or the cautioner has appeared, whichever may first happen.

84. Every caution shall be supported by an affidavit in the prescribed form, stating the nature of the interest of the cautioner, the land to be affected by the caution, and such other matters as may be prescribed.

Caution wrongfully lodged.

85. Any person who lodges a caution without reasonable cause shall be liable to make to any person who may sustain damage by the lodging of such caution such compensation as may be just; and such

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compensation shall be deemed to be a debt due from the person who has lodged the caution to the person who has sustained damage.

86. A caution shall not prejudice the claim or title of any person, and shall have no effect except as in this Act provided.

Costs. Doubtful questions of law or fact.

[87, 88 (1), 89: Eng. 1875, ss. 73, 74, 76, 77, Own. & Inc. 359, 360, 364.]

Certificates of ownership, office copies of leases, and certificates of charge.

[90-92: Eng. 1875, ss. 78-81, Own. & Inc. 365, as originally enacted; substitute "certificate of ownership" for "land certificate."]

Incorporeal hereditaments, mining rights, and easements.

93. (1) The proper master of titles may register the owner of any incorporeal hereditament of freehold tenure, enjoyed in gross, also the owner of any mines or minerals where the ownership of the same has been severed from the ownership of the land, in the same manner and with the same incidents in and with which he is by this Act empowered to register the owner of land, or as near thereto as circumstances admit.

(2) Where an easement in or over unregistered land is granted as appurtenant to registered land, the master, after such examination as he deems necessary, may enter such easement in the register of the dominant land with a declaration that the title thereto is absolute, qualified or possessory, or otherwise as the case may require, and shall cause to be registered in the proper registry division a certificate of such entry.

(3) Where an easement in or over registered land is granted as appurtenant to unregistered land, the master may issue a certificate setting out such easement and the land to which it is appurtenant, which may be registered in the registry division in which the land is situate, and he shall note on the register that such certificate has been issued.

94. (1) In the case of lands registered under this Act, no title to any ores, mines, or minerals shall be held to have passed, or shall pass, under section 3 of the Mines Act of 1892, or under section 3 of the Act respecting Mines, being chapter 36 of the Revised Statutes of Ontario 1897, or under section 3 of the Act to amend the Mines Act [63 Vict.], until the registered owner shall have had himself entered as owner of such ores, mines or minerals, or until his transferee or chargee shall have procured the master to make the entries authorized by subsection 3.

(2) In case of lands registered under this Act, no title to any ores, mines, or minerals shall be held to have passed, or shall pass, under chapters 16, 17, and 18 of the Acts [8 Edw. 7], or sections 53 and 54 of the Public Lands Act, until the registered owner shall have furnished to the proper master of titles a certificate of the minister of lands, forests and mines, or of a deputy minister, that the same were at the time of the passing of the said Acts the property of the Crown, and

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had not been staked out, recorded, leased, or granted under the Mining Act of Ontario passed in [8 Edw. 7], or under any statutory regulation previously in force, and until such owner shall have had himself registered as owner of the mines, ores or minerals, or his transferee or chargee shall have procured the master to make the entries authorized by the next sub-section.

(3) If any registered owner of lands shall have assumed to transfer or charge any mines, ores, or minerals reserved by the Crown and coming within the said Acts, the transferee or chargee may furnish to the said master the certificate of the minister or deputy minister as above provided, and shall have the right to apply to be registered as such transferee or chargee, and the said master may make all proper entries in order to define the interests of the persons then appearing to be entitled to the mines, ores or minerals, or any interest therein.

(4) No claim shall be sustained against the assurance fund in respect of any right arising under any of the said Acts by reason of any dealing with any ores, mines, or minerals which were prior to the passing of such Act subject to the reservation thereof to the Crown.

General provisions.

95. (1) There shall not be entered on the register or be receivable any notice of any trust, express, implied, or constructive.

(2) Describing the owner of any freehold or leasehold land or of any charge as a trustee, whether the beneficiary or object of the trust is or is not mentioned, shall not be deemed a notice of a trust within the meaning of this section, nor shall such description impose upon any person dealing with such owner the duty of making any enquiry as to the power of the owner in respect of the land or charge, or the money secured by the charge, or otherwise; but subject to the registration of any caution or inhibition, such owner may deal with the land or charge as if such description had not been inserted.

(3) Where two or more owners are described as trustees, the property shall be held to be vested in them as joint tenants, unless the contrary is expressly stated.

(4) Nothing in this section shall prevent the registration of a charge given by an incorporated company, for the purpose of securing bonds or debentures of the company, but the registration of any such charge shall not be deemed a guarantee that the proceedings necessary to render the same valid have been duly taken.

96. (1) No person shall be registered as owner of any undivided share in any freehold or leasehold land, or of any charge, apart from the other share or shares.

(2) The share of each owner may be stated, and where the extent of his interest appears on the register, or by the statement of his co-owners, he may transfer or charge his share, or he may without such statement transfer his share to his co-owners.

97. (1) Where the number of persons who may be registered as the owners of the same freehold or leasehold land, or charge, is limited by a rule, a number of persons exceeding the number prescribed shall not be registered as owners of such land or charge; and if the number of persons shewing title exceeds the prescribed number, such of them not exceeding the prescribed number as may be agreed upon, or as

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the proper master of titles in case of difference decides, shall be registered as owners.

(2) Upon the registration of two or more persons as owners of the same land, or of the same charge, an entry may, with their consent, be made on the register, to the effect that when the number of such owners is reduced below a certain specified number, no registered disposition of such land or charge shall be made, except under the order of the Court.

(3) In such a case the words "no survivorship" in the entry shall be construed to mean that if any one of the owners should die, no registered disposition of the land or charge shall be made except under order of the Court.

98. (1) Registered land shall be described in such manner as the proper master of titles deems best calculated to secure accuracy, but such description shall not be conclusive as to the boundaries or extent of the land.

(2) No alteration shall be made in the registered description of land, except under the order of the Court, or under section 119, or by way of explanation, or under rules of Court; but this provision shall not extend to registered dealings with registered land in separate parcels, although such land was originally registered as one parcel.

99. (1) There may be registered as annexed to any land which is being or has been registered, subject to general rules and in the prescribed manner, a condition or covenant that such land, or any specified portion thereof, is not to be built on, or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land.

(2) The first owner, and every transferee, and every other person deriving title from him, shall be deemed to be affected with notice of such condition or covenant; but any such condition or covenant may be modified or discharged by order of the Court, on proof to the satisfaction of the Court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant.

(3) The entry on the register of a condition or covenant as running with or annexed to land shall not make it run with the land, if such covenant or condition on account of its nature, or of the manner in which it is expressed, would not otherwise be annexed to or run with the land.

(4) Where a condition or covenant has been entered on the register as annexed to or running with land, and a similar condition is contained in a subseqnent transfer, or a similar covenant is in express terms entered into with the owner of the land by a subsequent transferee, or vice versâ, it shall not be necessary to repeat such condition or covenant on the register, or to refer thereto, but the proper master of titles may, upon a special application, enter such condition or covenant, either in addition to or in lieu of the condition or covenant first mentioned.

100. All the provisions of the Trustee Act which are not inconsistent with the provisions of this Act shall apply to land and charges registered under this Act, but this enactment shall not prejndice the applicability to such land and charges of any provisions of that Act relating to land or choses in action.

[101: V. 1915, s. 243, *ante* p. 454.]

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Instruments need not be sealed.

102. Notwithstanding the provisions of any statute, or any rule of law, any charge or transfer of land registered under this Act may be duly made by an instrument not under seal, and if so made, the instrument and every agreement, stipulation, and condition therein shall have the same effect for all purposes as if it were made under seal.

Married women.

103. A married woman shall for the purposes of this Act be deemed a feme sole, and may execute without seal any bar of dower or other instrument required under this Act.

Persons under disability.

104 [(1): Eng. 1875, s. 88, para. 1, Own. & Inc. 379.]

(2) If the infant has no guardian, or the idiot or lunatic has no committee of his estate, or if a person yet unborn is interested, the official guardian shall act with like power, or the proper master of titles may appoint a person with like power to act for the infant, idiot, lunatic, or person yet unborn.

Plans.

105. (1) Where land is surveyed and subdivided, for the purpose of being sold or conveyed in lots by reference to a plan which has not been already registered, the person making the survey and subdivision shall register in the proper land titles office a plan of the land, on a scale of not less than one inch to every four chains.

[There are 13 sub-sections; a new section (s. 105A) has also been inserted by s. 14 of the Stat. Law Amend. Act 1915.]

106. (1) In cases not provided for by section 105, the proper master of titles may require a person applying for registration to deposit a plan of the land, with the several measurements marked thereon, certified by an Ontario land surveyor, and as many counterparts as may be required, upon one of the following scales: [N. S. W. 1900, s. 114 (2)-(7), Aust. Torr. Syst. 138, 139.] . . . . . .

107. In case a plan of subdivision lays out any portion of the land as a street, road, lane or common, it shall not be registered unless on the application of the owner of the land subdivided, with the consent in writing of all persons who are registered as mortgagees or chargees thereof.

108. All instruments affecting the land or any part thereof, lodged with the proper master of titles after a plan is registered, shall conform and refer thereto, or registration shall not be had thereunder, unless the master under special circumstances deems it proper to accept the same.

109 [1917]. (1) No plan upon which a street, road, or highway is laid out shall be registered, unless it has been approved by the proper municipal council or councils, and no plan of land abutting upon a highway of a less width than 66 feet, or upon which there is laid out a highway of less width than 66 feet, shall be registered, unless it has been approved by the proper municipal council or councils, and by the Ontario railway and municipal board.

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(1A) No plan of survey and subdivision to which the provisions of the Planning and Development Act apply shall be registered, unless approved as required by that Act.

(1B) No plan of land in territory without municipal organization shall be registered, unless approved by the Ontario railway and municipal board.

(2) The approval of the proper municipal council referred to in this section may be upon terms and conditions embodied in an agreement signed by the owner of the lands laid out by such plan and by the municipality, and may be registered upon the lands so laid out.

110. (1) No plan, although registered in an office of land titles, shall be binding on the person registering the same, or upon any other person, unless a sale has been made according to such plan; and in all cases amendments or alterations thereof may be ordered to be made, at the instance of the person registering the same or his assigns, or of the owner for the time being of any of the land covered by the plan, by [the courts or the master].

. . . . . .

Notices.

112. (1) Every person whose name is entered on the register as owner of freehold or leasehold land, or of a charge, or as cautioner, or as entitled to receive any notice, or in any other character, shall furnish a place of address in Ontario, and may from time to time substitute some other place of address in Ontario for that originally furnished.

. . . . . .

113. A purchaser for valuable consideration, when registered, shall not be affected by the omission to send any notice by this Act directed to be given, or by the non-receipt thereof.

Specific performance. Rectification of the register.

[114-117: Eng. 1875, ss. 93-97, Own. & Inc. 381, 382.]

118. (1) Upon the conviction under this Act, or under the criminal law of Canada, of any person for an offence whereby such person fraudulently procured an entry on the register, by reason of which any person other than the rightful owner has become the registered owner of land, or by reason of which land under this Act has been wrongfully incumbered, the proper master of titles, on the application of the rightful owner, may cancel such wrongful entry, and may enter the rightful owner as the registered owner of the land.

(2) If while the wrongful entry was subsisting on the register, any innocent person has been registered as the owner of any charge upon, or any estate, right or interest in the land, the master, instead of cancelling the wrongful entry, may make an entry on the register, stating the fact of the conviction and revesting the land in the rightful owner subject to such charge, estate, right or interest, and the land shall thereupon be vested in the person named in such last mentioned entry in accordance with the terms thereof.

(3) This section shall apply to past as well as future cases.

119. (1) The proper master of titles may, sua sponte and without affidavit, enter a caution to prevent the dealing with any registered land, when it appears to him that an error has been made in any entry by mis-description of such land, or otherwise.

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(2) Subject to the rules the master, before the receipt of any conflicting instrument, or after notifying all persons interested, upon such evidence as appears to him sufficient, may correct errors and supply omissions in certificates of ownership or of charge, or in the register, or in any entry therein, and may call in any outstanding certificate for that purpose.

(3) Where the master under this section restores to the register any covenant or condition, he may do so with such modifications as he deems advisable, so as to do the least possible injury to the persons affected by their omission, or by their restoration, and upon notice to the attorney-general for Ontario, at the same time or subsequently may determine what damages (if any) shall be paid to any of the persons claiming to have been injuriously affected by the omission of the covenants, or by their restoration.

. . . .

Fraud.

. . .

Assurance fund.

123 [Am. 1918, s. 8]. (1) An assurance fund shall be formed for the indemnity of persons who may be wrongfully deprived of land, or some estate or interest therein, by reason of the land being brought under the provisions of this Act, or by reason of some other person being registered as owner through fraud, or by reason of any misdescription, omission, or other error in a certificate of ownership of land, or of a charge, or in any entry on the register.

(2) In order to constitute such fund, there shall be payable on the first registration under this Act of any land with an absolute or qualified title, in addition to all other fees, a sum equal to one-fourth of one per cent. of the value of the land apart from the buildings or fixtures thereon, and one-tenth of one per cent. of the value of the buildings and fixtures, and with a possessory title one-eighth of one per cent. of the value of the land apart from the buildings or fixtures thereon, and one-twentieth of one per cent. of the value of the buildings and fixtures.

. . .

(10) The master may require any applicant for registration to indemnify the assurance fund against loss by a bond or covenant to his Majesty, either with or without sureties, or by such other security as he considers expedient.

(11) It shall not be necessary that the assurance fees payable on first registration be then paid, but if not then paid the same shall be a charge on the land . . . . . .

(13) Where land is sold for taxes, or upon the winding up of a company, or under execution, or under the order of a court, the master may register the new immediate ownership subject to such charge, and where part of a parcel is so sold or is expropriated by any authority other than the Crown, he may, upon proof of payment of the proportion of such assurance fund charge which he deems to be fairly attributable to the part so sold or expropriated by any authority other than the Crown, note in the register the fact of such payment in respect of

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the land so sold or expropriated by any authority other than the Crown, and enter that part as free of the charge.

. . . . . .

124. (1) Any person wrongfully deprived of land, or of some estate or interest therein, by reason of the land being brought under this Act, or by reason of some other person being registered as owner through fraud, or by reason of any misdescription, omission or other error in any certificate of ownership or charge, or in any entry on the register, shall be entitled to recover what is just, by way of compensation or damages, from the person on whose application the erroneous registration was made, or who acquired the title through the fraud or error.

(2) Sub-section 1 shall not render liable any purchaser or mortgagee in good faith for valuable consideration, by reason of the vendor or mortgagor having been registered as owner through fraud or error, or having derived title from or through a person registered as owner through fraud or error, whether the fraud or error consists in a wrong description of the property or otherwise.

(3) If the person so wrongfully deprived is unable by such means or otherwise to recover just compensation for his loss, he shall be entitled to have the same paid out of the assurance fund, so far as the fund may be sufficient for that purpose having reference to other charges thereon, if the application is made within six years from the time of having been so deprived; or, in the case of a person under the disability of infancy, lunacy or unsoundness of mind, within six years from the date at which the disability ceased.

(4) The liability of the fund for compensation, and the amount of compensation shall, subject to appeal as in other cases, be determined by the inspector, unless the Court or the inspector on application directs some other way of ascertaining and determining the same.

(5) The costs of the proceedings shall be in the discretion of the Court or of the inspector.

(6) Any sum paid out of the assurance fund may afterwards for the benefit of the fund be recovered by action, in the name of the inspector, from the person on whose application the erroneous registration was made, or who acquired the title through the fraud or error, or from his estate, and the inspector's certificate of the payment out of the assurance fund shall be sufficient proof of the debt, but where the erroneous registration was made or the title acquired by mere error, and without fraud, credit shall be given for any sum which such person may have paid into the assurance fund in respect of such land.

(7) Where a registered disposition would, if unregistered, be absolutely void, or where the effect of the error would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the inspector may, in the first instance or after a reference to the Court, direct the rectification of the register, and in case of such rectification the person suffering by the rectification shall be entitled to the compensation provided for by this section.

. .

127. (1) No person shall be entitled to recover out of the assurance fund any compensation where

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(*a*) The claim is founded upon a right existing at the time of the first registration of the land, and the state of the title of the land at that time was such that the person who was first registered, or the person on whose nomination or authorization such registration was made, by a duly registered conveyance could have conferred, as against the claimant, a valid title to a purchaser in good faith for valuable consideration without notice of any defect in the title; and no sufficient caution had been registered and was in force when the application for first registration was made, or a patent was forwarded for registration, and the proper master of titles had not actual notice of the defect prior to the first registration;

(*b*) The claimant, by direction of the master or in accordance with the practice of the office, had been served with a notice of the proceedings being had in the office, whether such proceedings were prior or subsequent to first registration, and failed to appear in accordance with the requirements of the notice; or if the master had adjudicated against him and he had failed to prosecute successfully an appeal against the master's decision;

(*c*) The claimant has caused or substantially contributed to the loss by his act, neglect or default; and the omission to register a sufficient caution, notice, inhibition, or restriction to protect a mortgage by deposit, or other equitable interest, or any unregistered right, or other equitable interest, or any unregistered interest or equity created under section 68 or otherwise, shall be deemed neglect within the meaning of this clause.

(2) In this section "claimant" shall include the person actually making the claim, and any person through whom he claims who he alleges was wrongfully deprived of land, or of some estate or interest therein.

. . . . . .

Withdrawing land from the registry.

129. (1) Where, after land has been registered, special circumstances appear, or subsequently arise, which make it inexpedient that the land should continue under this Act, the owner may apply in the prescribed manner to the proper master of titles for the withdrawal of the land from the Act.

(2) If the owner proves before the master that all persons interested in the land proposed to be withdrawn, consent to its withdrawal, and satisfies the master that special circumstances exist which render the withdrawal of such land or a part thereof expedient, the master may issue his certificate describing the land, or such part thereof as the consent covers and as the master deems proper, in such a manner that the certificate can be properly registered in the registry office for the registry division in which the land is situate, and upon the certificate being issued this Act shall cease to apply to the land described therein, and the land shall thereafter be subject to the ordinary laws relating to real estate, and to the registry laws.

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(3) The certificate of a local master under this section shall not be valid unless approved and countersigned by the inspector.

(4) Upon the production of the certificate to the registrar of deeds and payment of a fee of $1, the same shall be duly registered.

(5) This section shall not apply to land registered under section 159.

ADMINISTRATION AND MISCELLANEOUS.

Office of land registry.

134. (1) The proper master of titles by summons under the seal of his office, may require the attendance of all such persons as he may think fit in any application made to him, and may in the summons require any person to produce for inspection any document, deed, instrument or evidence of title, to the production of which the applicant or any trustee for him is entitled.

(2) He may also, by a like summons, require any person having the custody of any map, plan, or book made or kept in pursuance of any statute to produce such map, plan, or book for his inspection.

. . . . . .

Right to inspect registry.

[137: Eng. 1875, s. 104, Own. & Inc. 385.]

Rules.

138. The Lieutenant-Governor in Council, or the judges of the Supreme Court, under the authority of sections 109 and 110 of the Judicature Act, which are to be read as applying to this Act, may make general rules [Eng. 1875, ss. 111, 112, Own. & Inc. 396, 397.]

. . .

EXTENSION OF ACT TO OTHER LOCALITIES AND EXPENSES.

146. (1) The municipal council of a county, or of a city or town separated from the county for municipal purposes, may pass a by-law declaring it expedient that the provisions of this Act be extended to the county, city or town.

INSPECTOR OF OFFICES OF LAND TITLES.

156. (1) The Lieutenant-Governor in Council may appoint an officer, to be called the Inspector of Land Titles Offices.

(2) The inspector shall, subject to the rules, have the like powers and duties as an inspector under the Quieting Titles Act, and as an inspector under the Registry Act, respectively, and such other duties as may be required of him by the rules, or he may be required by the Lieutenant-Governor in Council to perform.

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REGISTRATION OF NEWLY PATENTED LANDS IN DISTRICTS.

159. (1) Where any land situate in a provisional judicial district is granted by letters patent, or by order of the Lieutenant-Governor in Council, the letters patent or a certified copy of the order in Council shall be forwarded to the local master of titles of the district, for the purpose of the grantee being entered as the first registered owner of the land, with any necessary qualifications.

. . .

(6) Letters patent from the Crown demising land or mining rights for a term of years, or for any greater estate, granted on or after the 31st day of December 1887, shall be deemed to have been and to be within the provisions of this section.

160. Where land situate in a provisional judicial district has been patented by the government of Canada the local master of titles shall have authority to register the patentee as owner of such land, and may do so without submitting his finding upon the application to the inspector for his concurrence.

161 [Am. 1918, s. 10]. (1) Upon an entry of ownership being made, the local master of titles, unless where land is free grant, or otherwise exempt from execution, shall in the prescribed form notify the sheriff in whose bailiwick the land lies of the entry of the patentee as owner.

(2) The notice shall be sent by registered post, and no entry of any dealing with the land shall be made in the register until fourteen days after the mailing of the notice, unless proof is previously made that the land is not liable to any execution.

(3) The sheriff, upon receipt of the notice, shall forthwith transmit to the local master a copy of any execution in his hands affecting the land of the patentee, and if within the fourteen days no copy of an execution against the land of the patentee is received from the sheriff, the local master may assume that the land is not subject to any execution, and may enter subsequent dealings with the land accordingly; and as against such entry no claim shall afterwards be sustained in respect of an execution against the patentee.

(4) Where the local master receives from the sheriff a copy of an execution affecting the land, an entry thereof shall be made against the land, and all dealings with it shall be subject to such execution.

162. (1) Where a patent for land is forwarded to a local master of titles under section 159, and it is made to appear to him that the patentee since the date of the patent has transferred the land to some other person, the transferee, or in case of a further transfer or transfers the ultimate transferee of the land, shall be entered as the first registered owner, and shall be described as the transferee of the patentee or otherwise according to the fact.

(2) Before entering a transferee as first registered owner, the local master shall require evidence to be produced, shewing that there is no execution affecting the land.

. . . .

NOTE.—The Act contains no schedule of forms or other schedules. Under s. 138 of the repealed Act of 1911—s. 138 in the present Act (*ante*, p. 545)—Rules were made, which appear to be still in force, containing schedules of forms and fees. The Rules were adapted from

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those originally made under the English Act of 1875, with many additions, and differ considerably from the present English Rules of 1903-8. The 1911 Rules are published in a small volume containing the 1911 Act and an index, issued by the King's printer at Toronto. A few of the more important of the rules only are here printed.

SCHEDULE OF RULES.

Made under 1 George V. 1911, Cap. 28, Section 138.

[APPROVED BY ORDER-IN-COUNCIL, 26TH September, 1911.]

Charge of registered land.

. . . . .

27. (4) In the event of a foreclosure or sale being enforced by the registered owner of the charge, the master of titles shall, upon the application of the person entitled to the benefit of the foreclosure or sale, and on proper proof, make all necessary entries in the register. The applicant is to leave with the master a draft of the entry which he considers himself entitled to.

Transfer of registered charge.

28. . . (2) A transfer of a charge may contain an agreement that, upon the payment of a sum of money therein named, or upon the performance of any conditions therein stated, the charge shall be re-transferred to the transferor.

(3) The insertion of such agreement in a transfer of charge shall not affect the right of the transferee, while registered owner thereof, to deal with the charge.

. . . . .

Determination of lease.

31. (1) Where leasehold land has been registered, and the lease is determined, the master upon proof to his satisfaction of the determination may upon the application of the owner of the reversion or his solicitor, whether the title of such reversion is a registered title or not, notify such determination on the register.

(2) Where the reversion is in the Crown on behalf of the province of Ontario, such application may be signed by the minister of lands, forests and mines, or by a deputy minister.

(3) This rule shall, where applicable, extend to applications to notify the determination of any lease or agreement for a lease under section 70.

. . . . .

Assignment for benefit of creditors.

38. Where registered land, or a charge, is transferred by a registered owner to an assignee for the general benefit of the creditors of

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the transferor, whether by general words or otherwise, the master of titles shall, upon the application of the assignee, describing the lands by the numbers of the parcels under which they are registered, and upon proper proof being given, subject to the requirements of any caution or inhibition which has been entered, register the assignee as the owner of any lands or charges registered in the name of the transferor, affected by the transfer, to such assignee subject to any incumbrances that may appear thereon, and shall describe such trustee shortly, as assignee for the benefit of the creditors of the transferor, or to the like effect, but without setting out the terms of the trust under which the land or charge is held.

. . . . .

Lease prohibiting alienation.

46. On the registration of any leasehold land, held under a lease containing a prohibition against alienation without license, provision shall be made for preventing alienation without such license, by an entry on the register of a reference to such prohibition.

Land certificate.[1]

47. . (2) A land certificate to the transferor under section 38 where only part is transferred may, if the master of titles shall think fit, consist of his subsisting land certificate (if any) with a memorandum thereon shewing the part disposed of.

(3) No new land certificate shall be issued under section 38 to the same owner unless the old certificate is delivered up, except as provided in section 90.

(4) Where the whole parcel is transferred, the master instead of delivering a new certificate, may write on the existing certificate a memorandum shewing the transfer and new ownership, and the same shall have the effect of a new certificate to the transferee, but a land certificate shall not be again transferred where on account of the number of transactions endorsed thereon, or for any other reason, the master deems such transfer inexpedient.

Certificate of charge.

48. . (2) Where a charge is transferred the master, instead of delivering a new certificate of charge, may write on the existing certificate a memorandum shewing the transfer and new ownership, and the same shall have the effect of a new certificate to the transferee.

. . . .

Number of registered owners.

53. Any number of persons may be registered as owners of any parcel of land or of a charge.

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[1] The expression "land certificate" is obviously due to hasty adaptation of the English Rules, and "certificate of ownership" is meant: see s. 14, *ante*, p. 522.

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Instruments executed under powers of attorney.

58. If any document left in the office for registration purposes has been executed under a power of attorney, the power of attorney (form 52) shall be produced, and, if the master of titles shall so direct, left in the office, and the execution thereof by, and the identity of, the principal, and the execution of the document by, and the identity of, the attorney shall be duly verified, and such evidence furnished (if any) that the power of attorney was effectual at the date of the execution of the document thereunder as the master of titles may direct. (form 51.)

Instruments executed by corporations.

60. Where a document is executed by or on behalf of a corporation, the execution thereof shall be duly proved by the affidavit of a subscribing witness, who may be an officer of the company. The affidavit of some officer of the company shall also be furnished which shall state the official position of the persons who execute the said document on behalf of the company, and that they are authorized by the by-laws of the company to execute such documents if they are so authorized (form 50). A copy of the by-law or by-laws conferring this authority shall be produced and left with the master, if he requires the same. If the persons who execute are not authorized by by-law, the affidavit shall state how they are authorized.

The companies register.

66. (1) there shall be kept in every land titles office a register to be called "the companies register."

(2) There shall be entered in the said register short particulars of the powers of companies in respect of land, of the amalgamation or absorption of companies, or of changes in the names of companies, or copies of or extracts from the instruments by which the amalgamation, absorption or changes are effected, in case a company affected by any such instrument desires the registration thereof, or in case any person interested requires the registration of an instrument with reference to which proof in respect of any such matter is required.

(3) Where a company desires to be entered as owner of land or of a charge, or transfers or charges land, it shall produce to the master the charter or other instrument conferring the authority to hold, mortgage, or transfer land, or an exemplification, or a copy thereof, certified by the proper officer in that behalf, or shall produce such other evidence as is satisfactory to the master, unless such instrument has been previously registered in the companies register. In case the original or exemplification is not to be left in the office, a copy of such original or exemplification shall be left.

(5) The entry in the said register of the particulars required or authorized by this rule in respect of any instrument, or the entry of a

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copy of any such instrument in the register, shall be deemed a registration thereof for the purposes of the Land Titles Act.

. . . .

Forms.

80. (1) The forms in schedule A hereto shall be used in all matters to which they refer, or are capable of being applied or adapted, with such alterations and additions only as are necessary to meet the circumstances of each case; but no recital, reservation, covenant, declaration or other provision not referred to in or required by such forms, shall be inserted therein, unless the master under special circumstances otherwise directs.

(3) The master may reject any document which is informal, or which he may consider is not in accordance with this rule.

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[Sched. A contains the forms, and sched. B the tariff of fees.]

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BRITISH COLUMBIA.

LAND REGISTRY ACT

(R. S. 1911, c. 127).

NOTE.—The Act of 1911 has been amended in every succeeding year to the time of writing, and these amendments down to and including those of 1918 are embodied in the following print. The omitted portions relate to the details of the practice and procedure in the registry, or are otherwise of minor importance.

The scheme of the Act is "to separate for the purposes of the Act the legal estate from all equitable interests or incumbrances. The one is the 'fee', the other the 'charge'": *In re Granby Consol. M. Co.* [1919] 2 W. W. R. 321—though the actual decision was reversed by the Privy Council: 3 W. W. R. 331.

An Act relating to the transfer of land, and to provide for the registration of titles to land.

. . . . . .

Interpretation.

2. In the construction of this Act the following words and expressions shall have the meanings hereby assigned to them, unless the same be repugnant to or inconsistent with the context, that is to say:—

. . . . . .

"An indefeasible fee" means an estate in fee simple held under a good safe-holding and marketable title.

"Absolute fee" means and shall comprise the legal ownership of an estate in fee simple.

"Charge" means and shall include any less estate than the fee simple, or any equitable interest whatever in real estate, and shall include any incumbrance, Crown debt, judgment, mortgage, or claim to or upon any real estate.

"Judgment" means and shall include any judgment, decree, or order of any court whereby any sum of money is payable to any person, or whereby the possession of land is given to, or any estate vested in, any person by virtue thereof.

"Real estate" or "land" means and shall include lands, messuages, mines, and all other tenements and hereditaments whatsoever, with their rights, easements and appurtenances.

"Instrument" [N. Z. 1915, s. 2, *ante* p. 476.]

"Purchaser" means the person who last acquired the land otherwise than by descent or devolution of law, and shall include, and shall be deemed to have always included, a mortgagee.

. . . . . .

"Transmission" means and applies to every change of ownership consequent upon death, or upon any settlement, or upon foreclosure or sale under mortgage or incumbrance, sale under order of the Court, or for arrears of taxes or assessments.

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"Right to purchase" means conditional or absolute right to call for a conveyance of land in fee simple.

"Mortgage" means and includes any charge on land created for securing a debt or lien, or any hypothecation of such charge.

"Mortgagee" means the owner of a mortgage registered under this Act.

"Mortgagor" means and includes the owner of land, or of an estate or interest in land, pledged as security for a debt.

"Incumbrance" means and includes any charge or lien on land (other than a mortgage), or an hypothecation of such charge or lien.

"Incumbrancer" means and includes the owner of any land, or of an estate or interest in land, subject to an incumbrance.

"Incumbrancee" means and includes the owner of an incumbrance.

"Owner" and "registered owner" mean and include any person or body corporate registered under this Act as owner of an estate or interest in land, or of any mortgage, charge or incumbrance thereon, whether entitled thereto in his own right, or in his representative capacity, or otherwise howsoever.

"Register of indefeasible fees" means the volumes kept in the land registry offices, in which certificates of indefeasible title are entered and bound, or the register as kept at the time to which the context applies.

"Right of way" shall include land or any interest in land acquired for the purpose of constructing, maintaining or operating any railway, street-railway or tramway, or for erecting any pole-line, wood or timber chute, or for the laying or placing of drains, pipes or wires, or the conveyance of water, or any easement of like nature.

Registries, registrars and examiners.

Registration of the fee and its effect.

14. Every person claiming to be registered as the owner in fee simple of land shall apply to the registrar for registration thereof in the form A in the first schedule to this Act, and the registrar shall, upon being satisfied that a good safe-holding and marketable title in fee simple has been established by the applicant, who shall at the time of the application deposit with the registrar all title deeds in his custody, possession or power, register the title of such applicant in a book to be called the "register of indefeasible fees," which shall be formed by binding together one original of all certificates of indefeasible title as issued, and each certificate of title shall constitute a separate folio of such register.

(1) In case the registrar is not satisfied that a good safe-holding and marketable title has been established by the applicant, he shall (not being himself an examiner of titles) refer the title to the examiner of titles for report.

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(2) The examiner of titles shall either—

(*a*) Direct the registrar to register the title in the register of indefeasible fees; or

(*b*) Direct the registrar to register the title in a book to be called the "register of absolute fees," in the form B in the said first schedule; or

(*c*) Direct the registrar to register the title in the register of indefeasible fees, after giving such notice in such manner as he may direct, and provided no caveat is lodged; or

(*d*) Direct the registrar to refuse the registration.

(3) In case the registrar be himself an examiner of titles, he may in his discretion act in any one of the modes prescribed in the preceding sub-paragraphs of sub-section 2.

(4) The applicant may mark upon his application the words "absolute fee only required," or words to the like effect, in which case the registrar may—

(*a*) Register the title in the "register of absolute fees"; or

(*b*) Refuse to register the title;

and in either of such cases the assurance fund fee and the fee for a certificate of indefeasible title shall not be demanded from the applicant.

14A. (1) The registration of a mortgagee, or any person claiming under him, in the register of indefeasible fees as owner of the fee by virtue of a final order of foreclosure, shall operate to extinguish all rights of the mortgagee, or those claiming under him, under any personal covenant for payment contained in said mortgage, and any judgment obtained by him or them thereon, and any rights under any bond or collateral security or obligation for the payment of the mortgage debt.

(2) The mortgagee shall be at liberty at any time after serving such final order to apply for registration, and to endorse thereon "Interim certificate only required," and the registrar shall, if satisfied that a good safe-holding and marketable title has been made out by the applicant, issue to him a certificate in the form C (1) in the first schedule hereto, and note the fact of such issuance against the title in the register.

(3) Notwithstanding any rule of law or equity to the contrary, no such final order of foreclosure shall be or be deemed to be, or to have been, re-opened by the mortgagee proceeding to execution against the goods or lands of the mortgagor, or any person liable for the mortgage debt or any part thereof, unless he shall have recovered a portion of his debt through such proceedings.

(4) The mortgagee may at any time surrender the interim certificate, and upon such surrender and upon furnishing evidence satisfactory to the registrar that he has not since the date of the final order for foreclosure done any act to re-open the foreclosure, or recovered or been paid any portion whatever of the mortgage debt, shall be entitled to completion of registration in accordance with his application, and to the issuance of a certificate of indefeasible title to the mortgaged lands.

(5) In all applications founded upon a final order of foreclosure the registrar shall, upon production of the order nisi and final order, and of proof that the writ of summons was duly served upon all per-

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sons appearing upon his records as the owners of any interest in a charge upon the lands, priority to whose interests or charges is claimed by the applicant, be entitled to presume the regularity of all intervening proceedings, and no person, foreclosed by any such order who, having been served with the writ, is deprived of any lands or interest therein by the issuance of a certificate of indefeasible title, shall have any action or claim against the assurance fund based on any alleged defect in the foreclosure proceedings.

15. Save as in section 17 hereof provided, the land and every portion of the land comprised in any unregistered Crown grant shall be registered in the register of indefeasible fees.

(*a*) The registrar shall not register, or receive any application to register, any parcel of several or any portion less than the whole of or any interest less than the whole in the land comprised in any Crown grant unregistered wholly or in part, or in any conveyance, charge, or other instrument unregistered wholly or in part, unless and until registration of the remaining portion of the land or interest comprised in such Crown grant, conveyance, charge, or instrument is concurrently duly applied for, and no application as to any portion or interest shall be withdrawn unless the application for all other portions or interests of or in the same are also withdrawn: provided that nothing herein contained shall be deemed to prevent any person at any time from making application for, or obtaining registration of, title to any part of or interest in the lands passing under a will.

16. The registered owner of the absolute fee of any land may apply to the registrar in the form N in the first schedule for a certificate of indefeasible title, and the registrar shall on being satisfied that a good safe-holding and marketable title has been established by the applicant, who shall at the time of the application deposit with the registrar all title deeds in his possession, custody or power, register the title of such application (*sic*) in the register of indefeasible fees.

(1) In case the registrar is not satisfied that a good safe-holding and marketable title has been established by the applicant, he (not being himself an examiner of titles) shall refer the title to the examiner of titles for report.

(2) The examiner of titles shall either—

(*a*) Direct the registrar to register the title in the register of indefeasible fees; or

(*b*) Direct the registrar to register the title in the register of indefeasible fees, after giving such notices in such manner as he may direct, provided no caveat is lodged within the time specified; or

(*c*) Direct the registrar to refuse to register the title in the register of indefeasible fees.

(3) In case the registrar is himself an examiner of titles, he may in his discretion act in any of the modes prescribed by the last preceding sub-section.

17. No mine, mineral claim, or coal or petroleum right, or other undersurface right shall be registered in the register of indefeasible fees, nor shall any certificate of indefeasible title issue therefor.

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18. The registrar may effect registration of the fee as well at the instance of several persons, who together are entitled to the complement of the fee, as also of any joint tenant or tenant in common.

19. Upon every registration of an indefeasible fee, the registrar shall issue a certificate of title in duplicate, in the form C in the first schedule hereto, one original of which he shall retain, and the other original (hereinafter included in any reference to a duplicate certificate of title) shall be delivered to the person entitled thereto.

20. The registrar shall, upon the registration of every absolute fee, issue a certificate of title to the person entitled thereto, in the form E in the first schedule.

20A. On every application for the registration of any charge under an instrument signed by an owner or person entitled to be registered as owner, other than a lease or easement, the certificate of title shall be deposited with the registrar, who shall retain same or any new certificate of title subject to such charge on behalf of persons interested in the land mentioned in such certificate, until such land is freed from incumbrances. The registrar shall if desired furnish to the owner of such charge a certificate of charge; and before any dealing with or discharge of said charge is registered, such certificate of charge shall be delivered up to the registrar to be cancelled: provided however that the registrar may dispense with such production upon satisfactory evidence of the loss or destruction of such certificate.

20B. No one application shall include sub-divided and unsubdivided lands, or lots under different subdivision plans, or unsubdivided lands which are not contiguous (a road, dyke, stream, right-of-way or railroad not to be considered as a break in the contiguity), or except in the case of a mortgage more than 2,000 acres of unsubdivided lands. . . . . .

20C. (1) No first or subsequent certificate of title shall issue for more than fifty lots or parcels.

(2) Where two or more persons are registered as tenants in common, such persons may receive one certificate of title for the entirety, or each or any may receive a separate certificate for his undivided share, on delivering up for cancellation or endorsement any existing certificate of title comprising such share.

. . . .

22. (1) Every certificate of indefeasible title issued under this Act shall, so long as the same remains in force and uncancelled, be conclusive evidence at law and in equity, as against his Majesty and all persons whomsoever, that the person named in such certificate is seised of an estate in fee simple in the land therein described against the whole world, subject to—

(*a*) The subsisting exceptions or reservations contained in the original grant from the Crown;

(*b*) Any provincial tax, rate, or assessment at the date of the registration imposed, or which may thereafter be imposed on the land, or which had theretofore been imposed and which was not then due and payable;

(*c*) Any municipal charge, rate, or assessment at the date of the application for registration imposed, or which may thereafter be imposed on the land, or which had thereto-

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fore been imposed for local improvements or otherwise and which was not then due and payable;

(*d*) Any lease or agreement for lease for a period not exceeding three years, where there is actual occupation under the same;

(*e*) Any public highway or right of way, watercourse or right of water, or other public easement;

(*f*) Any right of expropriation by statute;

(*g*) Any lis pendens, mechanic's lien, judgment, caveat, issue or other charge, or any assignment for the benefit of creditors, registered since the date of the application for registration;

(*h*) Any condition, exception or reservation endorsed thereon;

(*i*) The right of any person to shew that any portion of the land is, by wrong description of boundaries or parcels, improperly included in such certificate;

(*j*) The right of any person to shew fraud wherein the registered owner has participated in any degree.

(2) Any certificate of indefeasible title issued under the provisions of this Act shall be void, as against the title of any person adversely in actual possession of and rightly entitled to the hereditaments included in such certificate at the time of the application upon which such certificate was granted under this Act.

(3) After the issuance of a certificate of indefeasible title, no title adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely.

23. The registered owner of an absolute fee shall be deemed prima facie to be the owner of the land described or referred to in the register, for such an estate of freehold as he legally possesses therein, subject only to such registered charges as appear existing thereon, and to the rights of the Crown.

24. The registrar may, upon being satisfied by affidavit or otherwise that any certificate or duplicate certificate of title has been lost or destroyed, and upon advertisement of his intention so to do published for one month at least in some one or more of the newspapers published in the province (at the discretion of the registrar), and upon payment therefor of the sum of one dollar, issue a fresh certificate of title in lieu of that so lost or destroyed. Such certificate shall bear on the face of it that it is a duplicate, and reference shall be made thereon to any affidavit or statutory declaration upon which it has been granted; and every such fresh certificate shall be available for all purposes and uses for which the former certificate would have been available, and be as valid and effectual as such former certificate.

25. Every certificate of title shall be received as prima facie evidence in all courts of justice in the province of the particulars therein set forth, without proof of the seal or signature thereon.

25A. No action of ejectment, or other action for the recovery of any land for which a certificate of indefeasible title has issued, shall lie or be sustained against the registered owner for the estate or interest in respect to which he is so registered, except in the following cases, namely:—

(*a*) The case of a mortgagee or incumbrancee, as against a mortgagor or incumbrancer in default;

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(*b*) The case of a lessor, as against a lessee in default;

(*c*) The case of a person deprived of any land by fraud, as against the person registered as owner through fraud in which such owner has participated to any degree, or as against a person deriving his right or title otherwise than bona fide for value from or through a person so registered through fraud;

(*d*) The case of a person deprived of any land improperly included in any certificate of title of other land, by wrong description of boundaries or parcels;

(*e*) The case of a registered owner claiming under an instrument of title prior in date of registration under the provisions of this Act, or in any case in which two or more certificates of titles may be issued under the provisions of this Act in respect to the same land;

(*f*) For rights arising or partly arising after the date of the application for registration of the title under which the registered owner claims;

(*g*) For rights arising under any of the clauses of section 22 of this Act.

25B. In any case other than as aforesaid, the production of a certificate of indefeasible title shall be held in any court to be an absolute bar and estoppel of any such action as in the last preceding section mentioned, against the person named in such certificate of title as owner of the land therein described, any rule of law or equity to tne contrary notwithstanding.

26. Where several registered parcels of land are included in one certificate of title, the registered owner may deliver up such certificate of title to the registrar for cancellation, and thereupon the registrar is authorized to issue as many certificates of title in lieu thereof as the owner may require, but so that no two new certificates of title cover the same parcel of land, and no such new certificate shall issue for any parcel of land by any description other than as described in the register:

(1) Provided however that nothing herein contained shall prevent a registrar from issuing a separate certificate of title for a right of way held in fee simple, of which a plan has been deposited, where the owner of the land is also the owner of the parcel, lot, or section through which the right of way passes.

Registration of charges.

29. (1) When the fee, whether indefeasible or absolute, or any less estate granted by the Crown, has been registered or registration thereof has been applied therefor (*sic*) any person not entitled to be registered in fee, claiming any less estate than the fee simple, or any mortgage or other incumbrance upon, or any equitable interest whatever in, the land (other than a judgment as to a sum of money payable to any person, Crown debt, or leasehold interest in possession for a term not exceeding three years), may apply to the registrar for the registration thereof in the form D in the said first schedule; and the registrar shall, upon being satisfied after examination of the title deed, or other evidence (if any) produced, that a prima facie title has

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been established by the applicant, register the title of such applicant, by making a memorandum thereof in the register and on the duplicate certificate (and on the certificate of title if issued prior to the passing of the Land Registry Act Amendment Act 1914), in the case of an indefeasible fee, and in the case of an absolute fee by registering the title of such applicant in a book to be called the "register of charges," in the form F in the said schedule; and the original or a duplicate of the document, or other evidence supporting the charge so registered, shall be deposited in his office.

(*a*) Before registering any charge, the registrar may give such notice in such manner as he may decide.

(*b*) Before the registration of any charge under an instrument executed by a body corporate, after the 31st day of May, 1916, which is also required to be registered in the office of the registrar of joint stock companies pursuant to the Companies Act or any other Act of the province (subject to any provisions to the contrary contained in any such Act), there shall be delivered to the registrar a certificate under the hand and seal of the said registrar of joint stock companies, stating that such instrument has been registered in accordance with the provisions of the Companies Act or such other Act as aforesaid, and giving the date of such registration and sufficiently identifying such instrument.

(2) On any application for registration of an assignment of a registered charge, the registrar may in his discretion, in lieu of any other registration, register the transfer of such charge by striking out the name of the registered owner of same in red ink and entering in lieu thereof the name of the transferee, and by entering the number of the application and the number assigned to the documents deposited or filed in support of the registration, and any other particulars he may consider necessary; and thereupon the transferee shall be deemed to be the registered owner of such charge.

. . . . . .

32. A charge may be registered as well in respect of a present and vested right, as of a future or contingent interest.

33. No equitable mortgage or lien, created simply by a deposit of title deeds and memorandum thereof, shall entitle the person interested to registration under this Act.

34. The registered owner of a charge shall be deemed prima facie to be entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing on the register, and to the rights of the Crown, and he shall be entitled to a certificate of the registration of his charge upon payment of the proper fee.

35. No instrument purporting to create a charge on land, executed by any person who is entitled to be registered as owner of the fee, shall be registered, unless the person purporting to create the same shall first be registered as the owner of the fee.

35A. No instrument purporting to create a charge under a sub-agreement shall be registered, unless the person who is entitled to be registered for the first right to purchase, and also all intermediate agreements and assignments, are first registered.

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35B. No sub-charge or assignment of a charge shall be registered, unless the charge upon which the same depends has first been registered.

Registration of tax-sale deeds.

36. (1) In the case of applications under tax sales, the registrar shall not take notice of any irregularity in the tax sale or in any of the proceedings relating thereto, or enquire into the regularity of the tax-sale proceedings, or any proceedings prior to or having relation to the assessment of the land; but a certificate from the proper officer of the Government or the municipality shall be furnished, shewing the years for which there were taxes due and in arrear for which the land was sold at such sale; and the registrar shall satisfy himself that the sale was fairly and openly conducted, and he shall also cause to be served upon all persons appearing by the assessment roll of the district in which the lands are situate, or by the records of the land registry office, to be the persons who, other than a tax purchaser or his assigns, are interested in such land, a notice in writing requiring them within the time limited by such notice to contest the claim of the tax purchaser; and in default of a caveat or certificate of lis pendens being filed before the registration as owner of the persons entitled under such tax sale, all persons served with notice under section 155 (6) of the Municipal Clauses Act 1906, or section 293 of the Municipal Act, or section 139 of the Assessment Act 1903, or section 253 of the Taxation Act, in cases in which notice under this Act is dispensed with as hereinafter provided, and those claiming through or under them, and all persons claiming any interest in the land by virtue of any unregistered instrument, and all persons claiming any interest in the land by descent whose title is not registered under the provisions of this Act, shall be for ever estopped and debarred from setting up any claim to or in respect of the land so sold for taxes, and the registrar shall register the person entitled under such tax sale as owner of the land so sold for taxes: provided however that the registrar may dispense with the giving of notice under this section in cases in which it is proved to his satisfaction that the notices prescribed by [enactments above mentioned] have been duly given and under the circumstances of the case are sufficient, or in cases in which the tax sale has been confirmed by an order of a judge of the Supreme Court.

. . . . .

40. On the application of a person entitled under the tax sale the registrar may dispense with the production of the certificate of title, and may issue a new certificate of title to the person entitled under the tax sale as owner of the land; and thereupon any certificate of title, or of registered estate, outstanding in respect of the same shall be deemed to be cancelled as to said estate or interest.

. . . . . .

Applications for registration generally.

43. When a title to land has been registered in the register of indefeasible fees, no application for registration of any estate or interest in the said land or in any part thereof shall be accepted in any land registry office unless as a charge on the said land, except an

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application for registration of the said estate or interest in the said register of indefeasible fees in accordance with the provisions of this Act.

. . . .

45. An applicant may withdraw his application as to the whole or any part of the lands comprised therein at any time prior to the registration of the title; but in case registration is applied for by an agent on behalf of some other person, or in the names of the applicant and some other person, the applicant shall not be allowed to withdraw his application until he produces the written consent duly verified of such other person to such withdrawal; and the registrar shall in such cases, as well as in cases wherein he shall reject or cancel an application, return to the applicant or to the person appearing to him to be entitled thereto all evidence of title lodged in support of the application as to the part withdrawn, together with the balance of fees properly returnable to him: provided however that any registered document deposited in support of the application so withdrawn shall not be returned, but shall remain in the land registry office as a perpetual deposit: provided always that in all such cases if a caveator shall have been put to expense without sufficient cause by reason of such application, he shall be entitled to receive from the applicant such compensation as a judge in chambers may order.

. . . .

Registration in general.

50. (1) Whenever any land or any estate or interest therein has been or is hereafter vested in any executor, administrator or trustee, the title of such executor, administrator or trustee shall be registered, but no particulars of the purposes or trusts (if any) created or declared in respect of the same shall be made (*sic*) in the register or on the certificate of title, but a memorandum shall be made in the register and on the certificate of title or certificate of charge (if any) by the words "in trust," or "upon conditions," or other apt words, and by reference by number to the instrument creating the same, which shall be filed in the land registry office when the application for registration is made: [a copy, in lieu of the original, may be filed in certain cases.]

(2) When any such memorandum has been entered upon the register and upon the certificate of title, no instrument purporting to transfer, mortgage or otherwise deal with the land, or any estate or interest therein, shall be registered unless—

(*a*) Such transfer, mortgage or other dealing is expressly authorized by the instrument creating the trust or purpose; or

(*b*) A judgment or order has been obtained from the Supreme Court or a judge thereof (1) construing the instrument in favour of such authority, (2) or ordering and directing such transfer, mortgage or other dealing, a copy of which judgment or order has been filed with the registrar; and a reference to such judgment or order shall be made on such certificate of title and on the register.

50A. A certified copy of an order in council, releasing or waiving the rights of the Crown in any streets, roads, trails or other highways

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which now are or may hereafter be vested in the Crown in right of the province, shall have the same effect as if a Crown grant had been issued by the Crown to the person in such order in council mentioned as transferee, and shall be so treated by the registrar. Unless such orders shall otherwise specify, any and all mines, minerals, coal and petroleum shall be deemed to be excepted therefrom.

51. (1) Notwithstanding the provisions of any statute, or any rule of law, any charge or transfer of land registered under this Act, except in the case of bodies corporate, may be duly made under an instrument without seal.

(2) Every instrument, other than a caveat, order of a court or judge, judgment, certificate of judicial proceedings attested as such, or an instrument executed by a corporation under its seal, required to be registered under this Act, shall be witnessed by at least one person, who shall sign his name to the instrument as a witness and add his address and occupation

52. Where by any letters patent, conveyance, assurance or will, or other instrument made and executed after the 20th day of April, 1891, land has been or is granted, conveyed or devised to two or more persons other than executors or trustees, in fee simple or for any less estate, it shall be considered that such persons took or take as tenants in common and not as joint tenants, unless a contrary intention appears on the face of such letters patent, conveyance, assurance or will or other instrument that they are to take as joint tenants.

53. Where two or more persons are interested in distinct estates or interests in the same land, by way of remainder or otherwise, the first owner of an estate of inheritance shall be registered as the owner of a fee, and the interests or estates of the others or other shall be registered by means of a charge or charges: provided however that in any certificate of title granted by the registrar under this section the owner of such estate of inheritance shall not appear to be possessed of a larger or different estate than that to which he is by law entitled: and provided also that all subsequent estates or charges shall duly appear on such certificate.

54. (1) Whenever any of the property of a deceased person passes by intestacy, or under a testamentary disposition, and the person claiming title thereto shall apply for registration of the testamentary disposition, or of the title of the heirs-at-law, or of any instrument affecting such property executed subsequently to the death of such deceased person, the application for registration shall not be deemed to have been made until an official copy of the grant of probate or of the letters of administration [is filed].

(2) If the property of an intestate consists entirely of real estate, so that letters of administration are not required to be issued, such application for registration may be received upon the filing [of certificate of payment of succession duties].

54A. Whenever any land or charge, excepting a judgment or lien, becomes or has become the subject of a transmission, the person entitled under such transmission shall, before the registration of any dealing therewith by him, make application to the registrar in the form A or D, as the case may be, to be registered as owner thereof, and the registrar may effect registration in pursuance of such applica-

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tion; and if the applicant becomes registered as executor or administrator of a deceased person, he shall thereupon, in the case of a charge, be invested with all the rights and powers which the deceased owner was possessed of, and the title of such applicant to such land or charge shall relate back, and take effect as from the date of the death of the deceased owner.

55. The registrar may, on the application of the guardian of any minor, or the committee of any lunatic or person of unsound mind, and on production of an order of the Supreme Court for that purpose, enter a charge on behalf of such minor, lunatic or person of unsound mind in respect of any interest in land held or possessed by such minor, lunatic or person of unsound mind while under the disability of infancy, lunacy or unsoundness of mind, upon being satisfied of such infancy, lunacy or unsoundness of mind.

56. On the transfer or devise of any estate or interest in land to two or more persons, it shall be lawful to provide in the deed or instrument transferring or devising such estate or interest that, unless otherwise directed by the Court or a judge, no transfer or charge effecting the whole or any part of such estate or interest shall be registered under the provisions of this Act, unless a like number of persons to those taking title under the said deed or instrument shall join in transferring or dealing with such estate or interest; and the registrar shall cause to be entered in the registry-books, and upon every certificate of title or other certificate and duplicates thereof issued to such persons evidencing their title to such estate or interest, following the names of such persons, the words "joint owners."

57. The words "joint owners" may be inserted on any application to register the title of two or more persons to any estate or interest in land, provided the application be signed by the applicants and not by an agent; and when so inserted after the names of the persons applying to have their title registered, such words shall have the same effect as if they had been inserted in the deed or instrument creating such title.

58. In any case where land the title to which has been registered has been forfeited to the Crown for non-payment of taxes, or for any other cause whatsoever becomes vested in the Crown, the collector or other officer acting in that behalf shall produce to the registrar of the land registry district in which the land so forfeited or vested is situate a certificate under the hand of the said collector or other officer of such forfeiture or vesting, and setting out particulars of the land so forfeited or vested, and in case of non-payment of taxes setting out that the land so forfeited or vested has been publicly exposed for sale for delinquent taxes, and that no sale had been effected and the amounts due are still unpaid, whereupon the land so forfeited or vested in the Crown for the use of the province shall be registered, by filing said certificate and making a reference thereto on the register-books against every title affected thereby, and thereafter any and all certificates of title and other certificates outstanding shall be deemed to be and shall be cancelled, in so far as they affect the land so forfeited or vested as aforesaid; and the title of the Crown upon such registration shall be conclusive, and shall be deemed and taken to be the true and correct title, from the day of the date of such registration as regards all persons, free from incumbrance, and shall be conclusive evidence

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that every application, notice, publication, proceeding, consent and act whatsoever which ought to have been made, given and done previously to the issuing of such certificate has been made, given and done by the proper authority to the proper persons.

59. There shall not be registered in any land registry office any title derived from his Majesty the King in the right of his Dominion of Canada to foreshore or tidal land, land under the sea, or land forming part or that at one time formed part of an Indian reserve, without the sanction of the Lieutenant-Governor in Council.

60. The attorney-general may in behalf of the Crown register a Crown debt against the land of any debtor to the Crown, in like manner as other charges are registered, and no Crown debt shall affect any lands of a Crown debtor unless and until the same be registered.

61. (1) The description of parcels shall in all cases where possible be that contained in the instrument which vests the land in the person whose title is registered, and the registrar shall have power to call for evidence of identity of any such parcels with the original grant or conveyance of such before effecting registration.

. . .

(5) It shall be the duty of any person having heretofore entered into or hereafter entering into an agreement of sale, sub-agreement or assignment, where the purchase price is payable by instalments or at a future time, to deliver to the party so buying said land an agreement, or other suitable instrument, in such form and executed by such parties that the title of the purchaser under such agreement or instrument shall be registrable; the execution of such agreement or instrument shall be duly acknowledged or proved under the provisions of this Act.

(6) It shall be the duty of any person having sold or conveyed or hereafter selling or conveying land, or who has heretofore entered into or hereafter enters into an agreement for sale, sub-agreement or assignment as in the preceding sub-section mentioned, to register his own title, in order that any person to whom any land has been or may be conveyed, and any person so buying said land or any interest therein, may be able to register his title or interest therein.

61A. (1) When two or more persons are the registered owners of land, or any estate or interest therein, and owing to the default of one another is or has been called upon to and has paid more than his proportionate share of any instalment of purchase money, or of any mortgage moneys, or of any interest, or of any taxes or insurance, or of any other payment which such owners are required to make under any covenant, term or condition entered into by them, or contained in the grant, conveyance assurance, agreement or other instrument whereunder they hold, or when such other has paid more than his proportionate share of any payment which is necessary in order to free the land from any charge, incumbrance or lien whereunder the same might be subject to forced sale, or the owners might be foreclosed or sued, then and in every such event the person so making any such payment may, in addition to all other rights and remedies to which he is or may be entitled by law or agreement, apply to a judge in chambers by originating summons to be issued and served pursuant to rules of court, for relief in accordance with the rules of the Supreme Court.

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(2) The judge may order that the applicant shall have a lien upon the share or interest in such lands of the person so making default, and may authorize the applicant to commence an action against such person so in default as upon an implied promise, and to enforce such lien, or may make such other or further order as may be just.

. . . . . .

(5) Any person entitled to a lien under an order made under subsection 2 hereof may file a caveat in respect thereof, to which caveat the provisions of section 69 of the Land Registry Act shall not apply.

Caveats and lis pendens.

62. Any person claiming to be interested under any will, settlement, trust deed, instrument of transfer, unregistered instrument, or as heir-at-law, or otherwise howsoever in any land the title to which has been registered may, by leave of the registrar to be granted upon such terms (if any) as the registrar may see fit to impose, lodge a caveat with the registrar [&c., Fi. 1876, s. 93 down to "expressed therein," Aust. Torr. Tyst. 685.]

62A. The registrar may file a caveat on behalf of his Majesty, or on behalf of any person who may be under any disability, to prohibit the transfer or dealing with any land belonging or supposed to belong to the Crown or to any such person; and also to prohibit the dealing with any land in any case in which it shall appear to him that an error has been made in any certificate of title or other instrument, or for the prevention of any fraud or improper dealing.

[63, 64: Fi. 1876, s. 93 (1, 2), Aust. Torr. Syst. 685.]

65. So long as any caveat prohibiting the transfer or other dealing with any land, mortgage, or incumbrance remains in force, the registrar shall not register any instrument purporting to transfer, mortgage or incumber the land, mortgage or incumbrance in respect to which such caveat is lodged, unless such instrument be expressed to be subject to the claim of the caveator.

[66, 67: Fi. 1876, s. 93 (4, 8), Aust. Torr. Syst. 685, 686.]

67A. After a caveat shall have lapsed or have been discharged, it shall not be lawful except as herein mentioned for the same person or for any one on his behalf to lodge a further caveat, but nothing herein contained shall prejudice the right of the registrar to enter any caveat under the powers vested in him by this Act; and a judge may, if he think proper upon application made to him for that purpose, and upon such terms as to costs or otherwise as he may consider just, order that a new caveat be filed, and such order shall fix a time within which the caveator must proceed to substantiate the right claimed under such caveat; provided that where a caveator has withdrawn his caveat the registrar may in his discretion allow a further caveat to be filed in respect to the same matter.

[68: Fi. 1876, s. 93 (9), Aust. Torr. Syst. 686.]

69. Twenty-one days after the notice to the caveator mentioned in the said form H, or if no notice shall be given two months after the receipt of a caveat by the registrar, such caveat shall be deemed to have lapsed, unless the person by whom or on whose behalf the same was lodged shall within those times respectively have filed with the registrar evidence that he has taken proceedings before the Court or a

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judge to establish his title to the land referred to, or his right as set out in such caveat.

70. The last preceding section shall not apply in the case of a caveat filed by the registrar, or lodged on behalf of the Crown or on behalf of any cestui que trust, heir-at-law or person under disability, who shall at the time of applying to the registrar to lodge such caveat file with such registrar evidence to his satisfaction that the caveator has a vested interest in the said land.

71. Any person who shall have commenced an action, or being a party thereto is making a claim, in respect of any land, may register a lis pendens against the same as a charge, and there shall be embodied in the certificate of the registrar of the Court a copy of the endorsement upon the writ, or a copy of the plaint or of the pleading whereby such claim to land is made, or in the case of a lis pendens under the Execution Act, a copy of the notice of motion.

Notice and priority.

72. The registration of a charge, from and after the time of the application for the registration thereof but not otherwise, shall give notice to every person dealing with the land against which such charge has been registered, of the estate or interest in respect of which the same has been registered.

73. When two or more charges appear entered upon the register affecting the same land, the charges shall as between themselves have priority according to the dates at which the applications respectively were made, and not according to the dates of the creation of the estates or interests.

75. The registrar shall, after registration of an indefeasible or an absolute fee, endorse on every deed or instrument produced or deposited in proof of the title a memorandum in the form G in the first schedule hereto . and every deed or instrument when registered, and every certificate of title indefeasible or otherwise, shall when signed by the registrar be deemed to be registered and issued and take effect as of the date, hour and minute when the application for the registration of same was received by the registrar in form required by this Act, and every such endorsement with such seal and initials shall have the same effect and be received in all courts as conclusive evidence of the registration as aforesaid of such retained deed or instrument.

76. The time at which application for registration shall be deemed to have been made shall be the time when the form of application referred to in sections 14 and 29 of this Act, filled up and signed by the applicant, is received by the registrar, and no application shall be deemed to have been made until the fees due on same shall have been paid.

Affidavits and acknowledgments of execution of deeds.

77. (1) Before any deed or instrument executed subsequently to the 8th day of October, 1865, other than a Crown grant, decree, judgment or order of a court of civil jurisdiction, is recorded or registered, and to entitle the same to be so recorded or registered, the execution thereof by the grantor or other conveying party shall first have been

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acknowledged or proved in the manner hereinafter provided; and such fact of acknowledgment or proof shall appear by a certificate under the hand and seal of the proper officer or other person authorized to take such acknowledgment, endorsed upon or attached to such deed or instrument.

(2) Where the execution of any deed or instrument is being acknowledged by a maker who appears to the officer taking such acknowledgment to be illiterate or blind, such officer shall state such fact in his certificate, and that the deed or instrument was read in his presence to such maker by whom such execution is being acknowledged, and that he appeared perfectly to understand the same and made his signature or mark in the presence of the officer.

(3) In case such acknowledgment or proof is being made by a witness to the execution by a maker who cannot speak, read or write English, or who is illiterate or blind, such witness shall prove that such deed or instrument was before execution read over to, or was interpreted to, the party executing the same by such witness in a language understood by the person so executing such deed or instrument (stating the language in which it was so interpreted, if interpreted) and that the person so executing such deed or instrument appeared perfectly to understand the same, and made his signature or mark thereto in the presence of such witness.

78. All acknowledgments, affidavits, oaths and declarations necessary for the purposes of this Act may be taken by and made before the registrar, or any notary public practising within the province, or a commissioner appointed to take affidavits to be used in the courts of the province. Acknowledgments or proofs of execution . may also be made to [other official persons, according as the execution is in British Columbia, or elsewhere within the British dominions, or outside the British dominions].

79. [Method of taking acknowledgment or proof.]

80. Acknowledgments and proofs of the execution of instruments entitled to be registered or recorded may, for the purposes of this Act, be made by—

(*a*) The party executing in person such instrument;

(*b*) The attorney in fact, when such instrument is executed by an attorney in fact;

(*c*) The secretary or other officer of any corporation authorized to affix the seal of the corporation to any instrument, when such instrument is executed by such officer;

(*d*) A subscribing witness to such instrument, except in cases of deeds executed by a married woman, any attorney in fact, or secretary or other officer of a corporation.

[Minute directions follow as to proof by an attorney, secretary, married woman (who must be separately examined) and subscribing witness].

(7) Provided however that notwithstanding any defect in the proof or form of execution of any instrument, the registrar may in his discretion, upon being satisfied of the due execution of such instrument and of the maker thereof being of the full age of twenty-one years, register or record the same; and such registration or record shall be valid or effectual for all purposes, notwithstanding any such defect.

81. (1) Whenever any instrument is produced for the purpose of the registration of any title purporting to convey the land of a mar-

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ried woman, or of any interest therein, it shall be sufficient so far as the execution of such instrument is concerned, and in order to entitle the same to be registered, that the married woman have made an acknowledgment of execution in the manner and form provided in the last preceding section; and every instrument so acknowledged by any married woman, and registered, shall be as effectual to all intents and purposes to pass all the estate, right, title, and interest of the married woman by whom the same is executed in the land to which the same relates as if she had been unmarried, any law and in particular the Act 3 & 4 Will. 4, c. 74, to the contrary notwithstanding.

(2) Any instrument heretofore or hereafter executed by an attorney for a married woman, under power of attorney duly acknowledged by her and filed in the proper land registry office, shall, if otherwise in order, be valid and effectual as from the date of the execution thereof for the purpose for which it was executed, notwithstanding the fact that such married woman did not personally acknowledge the execution of such instrument.

. . . . . .

Powers of attorney.

84. In every case in which any instrument shall have been executed by an attorney, the power of attorney, or a copy thereof duly certified to be a true or office copy by the registrar, or the registrar of joint stock companies, in whose office the original is filed, shall be filed in the office of the registrar, and the application for registration shall not be deemed to have been made until such power of attorney or duly certified copy thereof shall have been delivered to the registrar for that purpose.

(*a*) Every person appointed as such attorney must be of the full age of twenty-one years at the time of his appointment, and proof of such fact shall be made to the registrar at the time of filing such power of attorney. . . . .

(*c*) Such power of attorney shall comply with the requirements of the Power of Attorney Act.

. . . . . .

85A. (1) Every power of attorney shall, unless otherwise expressed, confer upon the donee of such power the same rights and powers, in respect of property acquired by the donor of such power after the execution of such power of attorney, as is conferred upon the said donee by such power of attorney in respect to the property owned by the donor at the time of the execution of such power of attorney.

(2, 3) [Section is made retrospective except as to pending litigation or disputes.]

Production of documents.

86. Upon every registration of title in favour of an owner in fee simple, mortgagee or other person by right entitled to the possession of documents of title, the registrar shall require the person requiring to be registered as owner in fee, mortgagee or otherwise, to produce the title deeds of the property to which such registration is intended to refer, unless the non-production of such title deeds, or any of them, be satisfactorily explained to the registrar on affidavit duly made:

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provided always that where the applicant desires to be registered as the owner of the absolute fee only, or as the owner of a charge upon the absolute fee only, and where the title has been already registered in the register of absolute fees, the registrar may in his discretion, on the certificate of title being produced, dispense with the production of all or any of the title deeds prior to the issuance of such certificate.

87. Whenever any instrument required to be produced or deposited cannot be produced by an applicant for registration, by reason of its being in the possession of a mortgagee or other person (including the registered owner of the land) who refuses or neglects to produce the same, the registrar may, upon being satisfied that the applicant has a good and proper title, first give notice in writing to the holder of such instrument of his intention to register the applicant's title at the expiration of the time specified in the said notice, which shall not be less than one week and not more than two months at the discretion of the registrar.

88. The said notice may be in the form I in the said first schedule; and after proof of service of the same on the holder of the instrument aforesaid, the registrar may, unless a good and valid objection thereto be made to him in writing within the time mentioned in the notice (or any extension thereof which he may in his discretion grant), proceed to the registration of the title of the applicant; and thereupon if such registration is for an estate in fee simple, any outstanding certificate of title or duplicate certificate of title the non-production of which is mentioned in said notice shall, notwithstanding anything to the contrary contained in this Act, be deemed to be cancelled as to the lands so registered in the name of the applicant.

Subdivisions of land.

89. (1) After the 1st day of March 1911, no land not being a mineral claim shall, for the purpose of sale or other alienation, be subdivided into parcels of five acres or less, nor shall any such map or plan of a subdivision of such land into parcels of five acres or less be deposited, and every application for the registration of any parcel of five acres or less shall be refused and no registration thereunder shall be made, unless the title to such land or parcel shall have first been registered in the register of indefeasible fees.

(2) Provided however that the foregoing shall not apply to any parcel of five acres or less already shewn on the register of absolute fees as a separate parcel, nor shall same apply to any parcel of five acres or less shewn as a separate parcel on any map or plan already deposited, or to any other parcel of five acres or less which in the opinion of the registrar is not a subdivision or part of a subdivision of land into five acres or less; but, if any such excepted parcel of five acres or less is subsequently included in any subdivision plan of land to which the foregoing does apply, the same shall apply to it. The provisions of the Land Act as to the reconveyance to the Crown of one quarter of certain lots in certain cases shall be strictly adhered to.

90. (1) Any person subdividing land (which shall include every division of land into two or more parts) shall, within three months from the date of such subdivision, unless such period shall have been extended by the registrar, tender to the registrar for deposit a plan in duplicate of such subdivision.

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(5) No such plan shall be received on deposit unless all the land included therein and subdivided thereby is registered under one title in the register of indefeasible fees.

. . . . . .

92. . . (8) Wherever upon any plan of subdivision heretofore or hereafter deposited in any land registry office, any portion of such subdivision is shewn as a street, lane, avenue, road, highway, park or public square, and is not designated thereon to be of a private nature, the marking or indicating on any such plan of any street, lane, avenue, road, highway, park or public square shall be deemed to be a dedication to the public of such portion thereof for the purpose and object indicated on or to be inferred from such marking on such plan. No certificate of title shall issue for any street, lane, avenue, road, highway, park or public square so dedicated as aforesaid:

(*a*) Such deposit shall be deemed to vest in the Crown in right of the province the title of such portion of such subdivision so shewn as a street lane, avenue, road or highway.

. . . .

94. If any person or corporation shall sell or convey, or agree to sell or convey, any lots or parcels of land by number or letter according to any plan or subdivision of any property before such plan has been deposited according to law, the purchaser of any such lot or parcel of land without knowledge of the non-deposit of the plan or of the necessity for the same, or any person claiming under him, may at his option on acquiring such knowledge rescind the contract of purchase and recover back any money paid thereunder with lawful interest, and any taxes or other expenses incurred by him in consequence of such purchase; and he shall in such case have a lien on such lot or parcel for all such moneys as against the vendor's interest in the said lot or parcel, but the vendor shall nevertheless be bound by any such contract, deed or conveyance, if the purchaser does not rescind the same.

. . . . . .

100. (1. 2) The registrar may require the owners of any land within his district desiring to transfer [&c., to deposit plan nearly as in N. S. W. 1900, s. 114 (1. 6), Aust. Torr. Syst. 138.] . . . .

[**100**A: N. S. W. 1900, s. 114 (as to scale of plan), and *supra*.]

Transfers.

102. When any conveyance or transfer is made of any land or interest therein the title to which is registered, the grantee or transferee shall be entitled to be registered as the owner of the same estate or interest held by or vested in the former owner; and in the case of an indefeasible or absolute fee a new certificate of title pursuant to either section 19 or section 20, as the case may be, shall be issued to the grantee or transferee on the production and cancellation of the former certificate or duplicate certificate, which certificate shall not be destroyed but shall be retained by the registrar and marked or stamped with the word "cancelled" and the date of the cancellation.

103. (1) Where a portion only of the land included in a certificate of absolute title has been conveyed, a memorandum of the con-

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veyance shall be endorsed on the certificate and a new certificate of title shall be issued for the portion conveyed. Where a portion only of the land included in a certificate of indefeasible title has been conveyed, a memorandum of the conveyance shall be endorsed on the certificate and on the duplicate thereof, and a new certificate of indefeasible title for the portion so conveyed shall be prepared and retained by the registrar, and a duplicate thereof transmitted to the person thereto entitled.

(2) For the purpose of allowing the cancellation mentioned in this or section 102, the holder of any certificate of title covering land for which he has given a conveyance or transfer shall deliver up his certificate of title to said land; and if such cancellation is only in part, the registrar shall after making same return the said certificate, or deliver a new certificate of title in lieu thereof, to the person entitled thereto.

104. (1) No instrument executed and taking effect after the 30th day of June, 1905, and no instrument executed before the 1st day of July, 1905, to take effect after the said 30th day of June, 1905, purporting to transfer, charge, deal with or affect land, or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest either at law or in equity in such land, until the same shall be registered in compliance with the provisions of this Act; but such instrument shall confer on the person benefited thereby, and on those claiming through or under him whether by descent, purchase or otherwise, the right to apply to have the same registered. The provisions of this section shall not apply to assignments of judgments.

(2) No purchaser for valuable consideration of, or holder of, a charge or incumbrance on any registered real estate or registered interest in real estate, or as to which registration is pending, shall be affected by any notice, express, implied or constructive, of any title, interest or disposition affecting such real estate which is not registered, or the registration of which is not pending, other than a leasehold interest in possession for a term not exceeding three years, any rule of law or equity to the contrary notwithstanding.

(3) No mortgagee, incumbrancee, or holder of a charge enforcing his mortgage, security, incumbrance or charge by exercise of the power of sale therein contained or by foreclosure, and no purchaser under the power of sale or under a sale in performance of an order of the court in a foreclosure suit, and no court in which a suit to enforce a mortgage, security, incumbrance or charge by foreclosure is pending, and no registrar or examiner of titles considering an application founded upon a sale under such a power of sale, or under a foreclosure decree, or under an order for sale in lieu of foreclosure, shall be bound by or have any notice of the rights or claims of any subsequent incumbrancee, or of any other rights or claims, registration whereof is not applied for until after a notice of the intended exercise of the power of sale, or a certificate of lis pendens in a foreclosure action, shall have been filed or registered in the land registry office wherein (*sic*) the lands affected are situate. Upon the filing of any such notice the registrar shall cause a note thereof by its filing number and series (if any) to be made in the index relating to such lands.

105. Instruments executed before and taking effect before the 1st day of July, 1905, transferring, charging, dealing with or affecting

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land, or any estate or interest therein, unless registered before the said date (except a leasehold interest in possession for a term not exceeding three years), shall not be receivable by any court or any registrar or examiner of titles as evidence or proof of the title of any person to such land, as against the title of any person to the same land registered on or after the 1st day of July, 1905, except in an action before the court questioning the registered title to such land on the ground of fraud wherein the registered owner has participated or colluded.

106. Every transfer or conveyance in the form L in the first schedule hereto shall, when registered but not otherwise, confer upon the person to whom it is made, his heirs and assigns (or upon his executors, administrators and assigns, as the case may be) all the estate and interest of the transferor or grantor, whether legal or equitable, at the date thereof, subject however to any charge that may appear on the register against the same, and also to any unregistered leasehold interest in possession for a term not exceeding three years; and shall also pass to the transferee or grantee, his heirs and assigns (or executors, administrators and assigns, as the case may be) the full and entire benefit of all covenants and agreements in respect of, and all powers, provisoes and conditions of entry, sale, leasing (if any) over, the real estate the subject-matter of the transfer to which the transferor was entitled and which may thereby be intended to be transferred at the time of such transfer; and if the estate or interest so transferred be that of a mortgagee, shall confer on the transferee, his executors, administrators and registered assigns the full benefit of and right to sue upon any covenant for payment of the mortgage moneys and interest thereon.

107. Any owner of land registered under this Act may make a valid transfer directly to himself jointly with another or others, and the registered owners may make a valid transfer directly to one of their number, either solely or jointly with some other person, and a trustee under a will may make a valid transfer to himself individually.

107A. (1) In a deed or other instrument it shall not be necessary, in the limitation of an estate in fee simple, to use the word "heirs," or in the limitation of an estate in tail to use the words "heirs of the body," or in the limitation of an estate in tail male or in tail female to use the words "heirs male of the body" or "heirs female of the body"; and for the purpose of any such limitation, it shall be sufficient in a deed or other instrument to use the words "in fee simple," "in tail," "in tail male" or "in tail female," according to the limitations intended, or to use any other words sufficiently indicating the limitation intended.

(2) Where no words of limitation are used, or where words of limitation which do not shew a contrary intention are used, a conveyance shall pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to or on the same. This subsection applies only if and as far as a contrary intention does not appear from the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

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107B. Every instrument presented for registration may be in duplicate, except a transfer or conveyance whereon a new certificate of title is required.

Reference to the court.

110. The court or any judge thereof may, on the application of any person interested in land, or on any application made on behalf of the owner of a future or contingent interest, by petition or otherwise, make an order, or issue a caveat, inhibiting any dealing with or registration of such land, and annex thereto any terms and conditions it or he may think fit.

111. Subject to the provisions of section 116A, the service upon the registrar of an office copy of any order of the Supreme Court or any judge thereof, or of any order, decree, rule, judgment, or any other proceeding touching the registration of land, shall without more be sufficient authority for him to act in compliance therewith.

112. All registrations of fees or charges made in pursuance of any order of the court as aforesaid shall stand in precisely the same position, and shall have such force and no other, as registrations of the fee or charges made under the ordinary provisions of this Act.

. . . . .

116A. Except as in section 50 provided, the registrar shall not issue a certificate of indefeasible title under or in pursuance of any order of the court or a judge, unless such order declares that it has been proved to the satisfaction of the court or such judge upon investigation that the title of the person to whom the certificate of title is directed to issue is a good, safe-holding and marketable title.

116B. Whenever upon the examination of the title to any land the registrar or examiner of titles refuses to register the title in the register of indefeasible fees, he shall, upon the written request of the applicant for registration, prepare and furnish to the applicant a report upon the title. . . .

116C. The applicant may thereupon petition the Supreme Court or a judge under the provisions of the Quieting Titles Act. . .

116D. The proceedings thereafter shall be governed by the Quieting Titles Act. . .

Contested titles.

117. Any person interested in land the title to which has been registered, and desirous of contesting such registration, may file an issue in the form M in the said first schedule. The registrar shall thereupon enter a memorandum of such issue against the land or interest referred to, in like manner as charges are entered, and within three months thereafter the person filing such issue shall bring an action against the person whose title is contested, and the court shall make such order, or give such judgment thereon, as to the cancellation or amendment of such registration, or otherwise, as the nature of the case shall require.

118. No such issue shall be filed or entered as aforesaid, until the person desirous of filing such issue shall produce to the registrar an affidavit shewing his interest in the land the registration of which is

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intended to be effected (*sic*), and shall furnish to the registrar security to the satisfaction of some judge of the Supreme Court, conditioned to bring his action within three months from the filing of the said issue, and to pay to the registered owner, or any person prejudicially affected by the filing of said issue, any costs or damages that such owner or other person may be awarded by any court of competent jurisdiction.

. . . . . .

120. If such action be not brought as aforesaid, the registrar shall cancel such issue on the application of the person whose title is contested, and such person shall be entitled to recover all costs, charges, damages and expenses which he may have sustained by reason thereof, against the party who has filed the said issue.

Service of notices.

. . . . . .

121A. A purchaser, mortgagee, or incumbrancee for valuable consideration shall not be affected by the omission to send any notice by this Act directed to be given, or by the non-receipt thereof.

122. The registrar shall not, nor shall any person acting under his authority, be liable personally to any action, suit or proceeding for or in respect of any act or matter bona fide done, or omitted to be done, in the exercise or supposed exercise of the powers conferred upon him, or the performance of his duties under this Act, or under any order, rule or regulation made in pursuance of this Act, or for any costs in connexion with any reference, appeal, action, suit or proceeding.

Actions against registrars.

123. Any person wrongfully deprived of land, or any estate or interest in land, in consequence of fraud or misrepresentation in the registration of any other person as owner of such land, estate or interest, or in consequence of any error, omission or misdescription in any certificate of title, or in any entry in the register, may bring and prosecute an action at law for the recovery of damages against the person by whose fraud, error, omission, misrepresentation, misdescription or wrongful act such person has been deprived of his land, or of his estate or interest therein. The bringing or prosecuting of an action as aforesaid shall not prevent proceedings being taken against the registrar in respect of any loss or damage not recovered in such action: provided that no action shall in such case be brought against the registrar without first proceeding as above provided, unless authorized by the fiat of the attorney-general.

[124: N. Z. 1915, s. 198 (1), *ante* p. 506, omitting reference to "*void or voidable instrument.*"]

125. In case the person against whom such action for damages may be brought as aforesaid shall be dead, or cannot be found within the province, then in such case it shall be lawful to bring such action for damages against the registrar as nominal defendant, for the purpose of recovering the amount of the said damages and costs against the assurance fund; and in any such case, if final judgment be recovered, and also in any case in which damages may be awarded in any

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action as aforesaid, and the sheriff shall make return nulla bona, or shall certify that the full amount with costs awarded cannot be recovered from such person, the minister of finance and agriculture upon receipt of a certificate of the court shall pay the amount of such damages and costs as may be awarded, or the unrecovered balance thereof as the case may be, and charge the same to the account of the assurance fund.

126. Any person sustaining loss or damage through any omission, mistake or misfeasance of the registrar, or of any of his officers or clerks, in the execution of their respective duties under the provisions of this Act, and any person deprived of any land, or of any estate or interest in land, by the registration of any other person as owner of such land, or by any error or omission or misdescription in any certificate of title, or in any entry or memorial in the register-book, and who is barred from bringing action of ejectment or other action for the recovery of such land, estate or interest, may in any case in which the remedy by action for recovery of damages as hereinbefore provided is barred, or where any damage has been sustained through any omission, mistake, or misfeasance of the registrar in the granting of a certificate of charges or certificate of incumbrance, bring an action against the registrar as nominal defendant for recovery of damages; and in case the plaintiff [&c., N. Z. 1915, ss. 187, 188 (1), *ante* p. 505.]

127. The minister of finance and agriculture shall pay the amount of any judgment obtained, payable out of the assurance fund, notwithstanding that there may not be a sufficient sum to the credit of the assurance fund.

[**128**: N. Z. 1915, s. 189, *ante* p. 505.]

129. An action against a registrar shall be brought against him by his name of office, and shall not abate or be in any way affected by any vacancy occurring in the said office, or by any change of officer.

130. No action for recovery of damages sustained through deprivation of land, or of any estate or interest in land, as hereinbefore described, shall lie or be sustained against the registrar, or against the assurance fund, or against the person by whose fraud, error, omission, misrepresentation, misdescription or wrongful act the person entitled to the land, or some estate or interest therein, has been deprived thereof, unless such action be commenced within the period of six years from the date of such deprivation: provided nevertheless that any person, being at the time of such deprivation under the disability of infancy or unsoundness of mind, may bring such action within six years from the date on which such disability shall have ceased.

[**131**: V. 1915, s. 240, *ante* p. 453, omitting references to insolvency.]

[**132**: V. 1915, s. 241, *ante* p. 453, adding, "nor for any error or shortage in area of any lot, block, or subdivision according to any map or plan filed or deposited in the office of the registrar."]

[**133**: V. 1915, s. 253, *ante* p. 457.]

134. It shall in all cases be a bar to the bringing of any action against a registrar or the assurance fund that the plaintiff in such action, or the person through or under whom he claims, was served with notice either personally or substitutionally, or not being served with notice had knowledge, that the registrar was about to commit

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the act through which the plaintiff claims to have been damnified, unless such person so served or having such knowledge shall have taken and prosecuted the proper proceedings to establish his claim to the land or to prevent such action on the part of the registrar.

135. The last twelve preceding sections shall not apply to any land the title to which is not registered in the register of indefeasible fees.

Assurance fund, how formed.

136. The assurance fund shall be formed by deducting from the amount of fees received by the registrar . the amount of twenty per centum per annum. . . .

Judgments.

137. . (*b*) No judgment shall form a lien upon any lands as against a registered owner thereof, or the holder of a registered charge thereon, where the registration of such person as owner or as holder of a charge has been effected after a notice of not less than fourteen days has been given by the registrar to the judgment creditor, either personally or at his registered address, of the registrar's intention to effect registration of the aforesaid fee or charge free of such judgment. If the judgment creditor claims a lien upon the said lands by virtue of his judgment, he shall within the time fixed by the registrar's notice register a certificate of lis pendens in accordance with section 34 of the Execution Act, otherwise the registrar may register such fee or charge free from such judgment. . .

. . . .

139. Upon application under this Act in the usual form, and production only of the conveyance to the purchaser of lands sold under the provisions of the Judgments Act or the Execution Act or the Mechanics' Lien Act, the execution of which conveyance shall be proved to the satisfaction of the registrar, the estate or interest in any land so sold may be registered under this Act, and therefrom any certificate of title outstanding in respect of the same land shall be deemed to be cancelled as to such estate or interest.

. . .

Voluntary conveyances.

141. Notwithstanding the provisions of any law or statute to the contrary, no conveyance, grant, charge, lease, estate, incumbrance, limitation of use or uses, which is executed in good faith, and duly registered in the proper land registry office before the execution of the conveyance to, and before the execution of any binding contract for the conveyance to, any subsequent purchaser from the same grantor of the same lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit or commodity in or out of the same, shall be or be deemed or taken to be, merely by reason of the absence of a valuable consideration, void, frustrate or of none effect as against such purchaser, or his heirs, executors, administrators or assigns, or any person claiming by, from or under any of them.

142. Nothing in the last preceding section contained shall have the effect of making valid any instrument which is, for any reason

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other than or in addition to the absence of a valuable consideration, void under the said statute or otherwise.

Transcript of deeds.

143. It shall be the duty of the registrar, when requested, and upon payment of the proper fee, to record in books to be kept for that purpose . all deeds and instruments in any manner affecting land, or the title to any interest therein, by correctly transcribing or copying the same. . .

[144. Reference to such record shall be made in the register books of the title to which such instruments relate, but such record or reference shall not in any way have the effect of registration.

. .

Transfer and cancellation of charges.

148. (1) When any Crown debt, charge, or issue has expired or been satisfied, or discharged in whole or in part, or any interest in land surrendered or released, the registrar shall upon satisfactory proof thereof cancel the entry respecting same, wheresoever registered, by a memorandum according to the circumstances in the form O in the first schedule hereto, and if such cancellation is in whole shall also cancel the entry made against the registration of the fee or of any prior charge, as the case may be, by entering over same the word "cancelled." The original or a duplicate of every document in support of the cancellation shall be deposited with the registrar.

(2) The registrar shall cancel the registration of any judgment in whole, or as to any specified land, upon satisfactory proof of the judgment having been satisfied, or the whole or such specified land having been released therefrom.

150. The registrar may, in the case of a lease or agreement for sale and purchase of land, upon proof to his satisfaction of breach of covenants and entry and recovery of possession by a lessor or vendor, and upon thirty days' notice to the lessee or purchaser, and upon hearing all parties attending, cancel the registration of the same upon the register; and thereupon the lease or agreement, and the estate of the lessee or purchaser as the case may be in the land described in the lease or agreement, shall cease and determine, but without releasing the said lessee or purchaser from his liability in respect of any covenant in such lease or agreement, expressed or implied.

. . .

153. In every case of cancellation of a charge, Crown debt or judgment, the estate or interest in respect of which such charge, Crown debt or judgment shall have been registered, shall be deemed to be discharged and released from the date of entry thereof on the register; and in those cases where a reconveyance, surrender or transfer would have been otherwise necessary, such memorandum in said form O as aforesaid shall operate as a reconveyance, surrender or transfer in favour of the persons entitled to the equity of the land in question, and the charge, Crown debt or judgment shall no longer affect (*sic*) in respect of which it was registered.

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169. All title deeds, instruments, and documents deposited with the registrar on any application or proceeding shall remain as a perpetual deposit in his office, save in case registration be refused, when all unregistered title deeds, instruments, documents, and maps deposited shall be returned to the applicant.

Powers of registrars.

170. It shall be lawful for the registrar or the examiner of titles to exercise the following powers in addition to others conferred under this Act, that is to say:—

(*a*) He may require any person desiring to effect any registration or cancellation of registration, or any other act, matter or thing, to produce, or produce and deposit, any grant, certificate of title, conveyance, bill of sale, mortgage, deed, lease, will or any other instrument in his possession or within his control, affecting the land or the title thereto; and

(*b*) He may, for the purposes of this Act, administer oaths, or in lieu of administering an oath may require any person examined by him to make and subscribe a declaration of the truth of the statement made by him in his examination; and

(*c*, *d*) Upon such evidence as appears to him sufficient in that behalf, correct errors in entries made, and supply [&c., V. 1915, s. 233 (ii), *ante* p. 452.]

(*e*) He may by summons require any person having an instrument in his possession in any capacity to produce before him any instrument in his possession or within his control, affecting any land, mortgage or incumbrance, or the title thereto, and if required to complete any registration, to deposit the same with him;

(*f*) He may summon any person, whose evidence may be necessary or material in respect to any matter pending before him, to appear and give evidence upon oath respecting such matter, and to produce any instrument or evidence of title before such registrar, or before any other person appointed under an order of such registrar.

(*g*) He may, in all cases where any instrument is executed by or on behalf of or in favour of any corporation, require any person applying to register, file or deposit such instrument, to give him such evidence as he may deem sufficient of the date of the incorporation, or of the license or registration in this province, and may also from time to time require such applicant to file a certified copy of the charter or certificate of incorporation, and of the memorandum of association, and of the articles of association, of such corporation, or of such portions thereof as he deems necessary.

170A. If it appears to the registrar that any certificate of title or other instrument has been issued in error, or contains any misdescription, or that any entry or endorsement has been made in error

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on any certificate of title or other instrument, or that any such certificate, instrument, entry or endorsement was fraudulently or wrongfully obtained, he may, whether such certificate or instrument is in his custody or has been produced to him under a summons, so far as practicable without prejudicing rights conferred for value, on thirty days' notice to all persons interested, cancel such certificate or instrument, or correct any error in such certificate of title or other instrument, or in any entry made thereon, or in any memorial, certificate, exemplification or copy of any instrument made in or issued from the land registry office, and may supply entries omitted to be made: provided always that in the correction of any such error he shall not erase or render illegible the original words, and he shall affix the date upon which such correction was made or entry supplied; and every certificate of title so corrected, and every entry so corrected or supplied, shall have like validity and effect as if such error had not been made or such entry omitted.

170B. **170**C. In case any person, summoned by the registrar to produce or deposit a certificate of title or other instrument, refuses or neglects [&c., V. 1915, ss. 80, 81, *ante* p. 414].

. . . . .

Rules and orders.

173. The Lieutenant-Governor in Council may from time to time—

. . .

(*d*) Order that registration in the register of absolute fees, except in the case of under-surface rights, be discontinued in respect of land comprised in any registration district or in any portion or section thereof defined in such order, or that application for registration in respect of certain districts or portions or sections of districts defined in such order shall, except as to under-surface rights, be for an indefeasible fee only. . .

. . .

SCHEDULE

First schedule.

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Form L.

(Section 106.)

I. A.B. of in consideration of the sum of dollars, do hereby grant and convey [*or* transfer and assign] unto C.D. of and to his heirs [*or* executors, administrators] and assigns, all that piece of land , together with all my rights, powers, estate and interest therein, as registered in the register of indefeasible [*or* absolute fees or charges], vol. fol. No. .

Dated this day of , 19 .

Signed, sealed and delivered in the presence of } A.B.
E.F. }

. . .

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MANITOBA.

REAL PROPERTY ACT

(R. S. 1913, c. 171).

NOTE.—This Act is a revision or consolidation of the 1902 Act and its amendments, which are printed in a consolidated form in Can. Torr. Syst. 404 *et seq.* Amendments of the 1913 Act down to and including those of 1919 are embodied in the print following. Less important portions are omitted, as in other jurisdictions. References to the 1902 Act (M. 1902) indicate that the section to which the reference is appended is a re-enactment of M. 1902 as printed in Can. Torr. Syst.; these references are only made where a section is so far like an enactment elsewhere printed that it has been considered unnecessary to set it out here.

An Act respecting real property in the Province of Manitoba.

. . . . .

Interpretation.

2. (1) In this Act, and in all instruments purporting to be made, executed or registered thereunder, unless the context otherwise requires—

(*a*) The expression "land" means and includes land, messuages, tenements, hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein may be and whether legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto, and all trees and timber thereon, and all mines, minerals and quarries, unless any such are specially excepted;

[(*b*) : "Owner," "registered owner"; B. C. 1911, s. 2, *ante* p. 552. M. 1902, s. 2 (*b*).]

(*c*) The expression "lease" includes a sub-lease, and the expression "lessee" includes a sub-lessee;

(*d*) The expression "mortgage" means and includes any charge on land created for securing a debt or loan, or any hypothecation of such charge;

(*e*)-(*i*): "Mortgagee," "mortgagor," "incumbrance," "incumbrancer," "incumbrancee"; B. C. 1911, s. 2, *ante* p. 552. M. 1902, s. 2 (e-i).]

(*j*) The expression "person of unsound mind," means and includes any person, not an infant, who is incapable from infirmity of mind of managing his own affairs;

(*k*) The expression "instrument" means and includes any certificate of title, certificate of charge, book, plan or document in writing relating to any dealing with land, or creating any mortgage, incumbrance or lien thereon, or evidencing title thereto, or a duplicate thereof;

. . . . . .

(*p*) The expression "transmission" applies to every change of ownership under assignment for benefit of creditors,

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or under foreclosure or sale under mortgage or incumbrance, and to every involuntary change of ownership of land, mortgage or incumbrance;

(*q*) The expressions "grant," "patent," or "Crown grant," respectively, mean and include any grant of Crown land, whether direct from his Majesty or pursuant to the provisions of any statute, and whether such land was held by the Crown in the right of Canada or in the right of any province thereof;

(*r*) The expression "endorsed" means and includes anything written upon any instrument or other document, or in the margin thereof, or at the foot thereof;

(*s*) The expression "old system" means the system of registration provided by the Registry Act;

(*t*) The expression "new system" means the system of registration provided by this Act;

(*u*) Land shall be deemed to be "subject to the new system" while an application is pending to bring such land under the new system, and before a certificate of title shall have issued therefor; and land shall be deemed to be "under the new system" after a certificate of title shall have issued therefor;

(*v*) The expressions "land titles district" and "district" respectively mean a land titles district created or continued under this Act; and the expression "registration district" means a registration district created or continued under the Registry Act, and not brought within any land titles district;

(*w*) The expression "registrar" means a registrar under the Registry Act; and the expression "district registrar" means a district registrar under this Act;

(*x*) The expression "register" shall mean the volumes kept in a land titles office, in which certificates of title are entered and bound.

. . . . . .

[(3): N. Z. 1915, s. 223, *ante* p. 507. M. 1902, s. 2 (*z*).]

. . . . . .

Land titles offices—district registrars—officers.

. . . . . .

12. The district registrar shall keep a book to be called the day-book, in which shall be entered, by its day-book number, every instrument which is registered, with the day, hour and minute of filing; and for the purpose of settling priorities, the time of filing shall be taken to be the time of registration. The district registrar in entering memorials upon the certificate of title, and endorsing a memorial upon an instrument registered, shall take the time of filing from the day-book as the time of registration. . .

. . . . . .

14. . no registration heretofore or hereafter made under the old system shall affect any land which at the time of such registration was or is subject to or under the new system, so long as such land remains subject to or under the new system; nor shall any reg-

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istration heretofore or hereafter made under the new system affect any land which is not subject to or under the new system. . . .

. . .

[**19**: B. C. 1911, s. 122, *ante* p. 573. M. 1902, s. 19.]

. . . . . .

Manner of bringing land under new system.

. .

28. The owner of any estate or interest in land, whether legal or equitable, may by himself or his duly authorized attorney or agent apply to the proper district registrar to have his estate or interest, or the whole title to the land, registered under the new system, but it shall be in the discretion of the district registrar to refuse to entertain such an application unless all persons other than the applicant who are interested in the land shall be consenting parties to the application.

29 [1914, s. 1]. In every case in which a patent from the Crown, issued after the coming into force of this Act, for any land in any part of the province shall be filed or registered in any registry or land titles office, such lands shall at once be subject to the said Act and its amendments, except as to agreements for the sale of such land, and no instruments purporting to grant, transfer, mortgage or hypothecate the same shall thereafter be registered under the old system, excepting however agreements for sale as aforesaid; and in case the patentee is the owner of the land at the time of such filing the district registrar shall, upon the patentee making a statutory declaration in form satisfactory to him and upon payment of the proper fees for bringing the land under the said Act, issue the proper certificate of title without requiring the filing of the usual application therefor.

30 [1914, s. 2]. No instrument purporting to grant, transfer, mortgage or hypothecate any land in the territory added to the province of Manitoba by the Act c. 22 of the Dominion statutes of 1912 shall be registered under the old system of registration, excepting however agreements for sale of such land.

31 [Am. 1914, s. 3]. (1) Any certificate of title for any of the lands referred to in the next preceding section, heretofore issued under the Land Titles Act of the Parliament of Canada shall, on being produced to and filed with the proper district registrar, be deemed to be of force and effect equivalent to that of a patent from the Crown for the land, and upon the holder of the certificate making a statutory declaration in form satisfactory to the district registrar, and upon production of such other evidence as the district registrar may require and paying the proper fees, the district registrar may issue the proper certificate of title under the said Act for the land without requiring the filing of the usual application therefor.

(2) All certificates of title that had issued pursuant to the Land Titles Act of the Parliament of Canada and any amendments thereto, for land in the said added district, shall be deemed to have been certificates of title within the meaning of the Real Property Act of Manitoba, in so far as any registrations made in the Neepawa land titles office from the 15th May, 1912, to the 13th February, 1913, are concerned which affected any of the land described in said certificates.

32. The Lieutenant-Governor in Council may by order direct a district registrar to bring under this Act any land belonging to his

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Majesty in the right of Manitoba, and the filing with a district registrar of such order-in-council shall in all respects have the same force and effect as the filing of an application to bring land under this Act.

33. Contiguous country lands not exceeding altogether two thousand acres (a road not to be considered a break in the contiguity), or any number of lots under the same plan of subdivision, may be included in the same application; but in no case shall a first or subsequent certificate of title issue for more than fifty lots, or for unsubdivided lands which are not contiguous or which contain more than two thousand acres. The provisions of the section shall not apply to cases within the last preceding section.

34. When land subject to mortgage is brought under the new system, all rights, remedies and matters of contract between the mortgagor and mortgagee in relation to such land shall remain intact, as if such land were under the old system.

35. Notwithstanding anything in this Act contained, an application shall not be received to bring under the new system an undivided interest in any land, unless an application is also made for all other undivided interests in the same land; and no withdrawal or rejection of any application for an undivided interest shall be permitted, unless the application for all other undivided interests in the same land are withdrawn or rejected.

36. The father, or if the father be dead the mother or other guardian of any infant, or the committee or guardian of any person of unsound mind, may apply on behalf of such infant or person of unsound mind to bring land under this Act; and a person holding a power of attorney authorizing the sale of a freehold or other estate in any land may apply in respect of such land in the name and on behalf of the owner, unless such power of attorney expressly prohibits him from so doing.

37. Upon the filing of an application to bring land under this Act, whether or not the application is made by any person entitled to make it under this Act, and whether or not it is in any respect in accordance with this Act, such land shall become subject to the new system, and no registration under the old system shall affect such land unless such application be withdrawn or rejected by the district registrar, in either of which events the land shall thereafter, until a further application be filed to bring it under the new system, be dealt with under the old system.

38. Any person, except a tax sale purchaser, applying to bring land under the new system may in his application, or upon special request in writing addressed to the district registrar prior to the drafting of the certificate of title, direct the certificate of title for such land, or any part thereof, to be issued in the name of some other person, or in the names of himself and some other person; and such direction, whether comprised in an application or in a special request, shall from the time of its filing with the district registrar have the effect of conveying and transferring to such person, or to the applicant and such other person as the case may be, as regards such land, all the estate or interest whether legal or equitable which the applicant is entitled to and directs to be transferred, as fully and effectually as if such estate or interest were transferred by deed and such deed were duly registered.

[**39**: V. 1915, s. 33, *ante* p. 406. M. 1902, s. 36.]

. . . . . .

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43. If the district registrar find that some person other than the applicant has, or appears to have, some right or claim to or against the land in question, he may issue a notice and cause such person to be served with a copy thereof, to the effect that no certificate of title will issue for such land pursuant to the application, unless the person appearing to have such right or claim shall, within the time limited by the notice, which time shall in each case be fixed by the district registrar, take proceedings to stop the issue of such certificate of title.

. . . . . .

48. In the investigation of titles every patent which has been issued for ten years or upwards and which remains uncancelled, and as to which the district registrar has no notice that proceedings have been taken to set the same aside, shall be accepted by the district registrar as final, and it shall not be necessary to enquire whether such patent has been properly issued or not; but in all such cases the assurance fee to be paid under this Act shall be increased to one-half of one per cent., unless the district registrar shall in special cases otherwise direct.

49. The district registrar, on being satisfied of the due service of all notices that he may think requisite, and that the title to the land is safe-holding, may bring such land under the new system, and issue a certificate of title therefor to the person who appears to be entitled to the same.

Tax sales.

[**50-52**: B. C. 1911, ss. 36-40, *ante* p. 559. M. 1902, ss. 46-48.]

Withdrawal of land from new system.

53. [(1, 2): On. 1914, s. 129 (1, 2), *ante*, p. 544.]

(3) In such certificate the registrar-general shall state in whom at the time of the issue of such certificate he finds the title to the said land vested under the new system, and shall also state what mortgages, incumbrances, liens or interests said land is subject to; and upon the registration of such certificate under the Registry Act the title to the said land shall at once become vested under the old system in such person so named for all the right, title and interest mentioned in such certificate of withdrawal, subject only to the mortgages, incumbrances, liens or interests set forth in such certificate; and all rights, powers and remedies existing under said mortgages, incumbrances, liens or interests shall remain in full force and virtue, and the instruments under which the same were placed on record under the new system shall have the same force and effect as if the same had been instruments under the old system, and in the case of mortgages and incumbrances the same shall be construed as if the provisions of an Act respecting Short Forms of Indentures were incorporated in the said mortgages and incumbrances, and the said mortgages and incumbrances shall have the benefit of all the rights, power and remedies conferred by or secured under the said Act. . .

Powers and duties of district registrars.

54. In addition to any other powers conferred under this Act, a district registrar may—

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(*a*) Enter a caveat on behalf of his Majesty [&c., B. C. 1911, s. 62A, *ante* p. 564.]

[(*b*): B. C. 1911, s. 170 (*e*), *ante* p. 577, down to "title thereto."]

[(c): B. C. 1911, s. 170 (*f*), *ante* p. 577.]

[**55-57**: B. C. 170A-170C, *ante* p. 577.]

58. In any proceeding respecting land, or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorial or other entry affecting land, a judge may by decree or order direct the district registrar to cancel, correct, substitute, or issue any certificate of title, or make any endorsement or entry on any instrument, or otherwise to do every such act and make every such entry as may be necessary to give effect to the judgment, decree or order of the Court: provided that the district registrar shall not issue any certificate of title by order of the court unless the title of the person to whom the certificate of title is directed to issue has been found upon investigation by the district registrar to be a good safe-holding title.

. . . . .

60. In the event of a duplicate certificate of title or other instrument being lost or destroyed, the district registrar may dispense with the production of the duplicate certificate of title or other instrument upon any dealing; and upon the registration of such dealing the district registrar shall note in the register that no entry of such dealing has been made on the duplicate certificate of title or other instrument, and the registration of such dealing shall thereupon be valid and effectual: provided always that before registering such dealing, the district registrar shall satisfy himself that such certificate of title or instrument has not been deposited by way of lien or as security for any loan, and of the reasons for its non-production, and in the case of the duplicate certificate of title being lost, shall give at least fourteen days' notice of his intention to dispense with production thereof, in such newspaper as he shall think proper. The number of insertions in such newspaper, and the form of the notice, shall be settled by the district registrar.

61. In the event of a duplicate certificate of title being lost or destroyed, and after proceeding as in the last section set forth, the district registrar may issue a provisional [&c., N. Z. 1915, s. 80 (2, 3, 5), *ante* p. 486. M. 1902, s. 55.]

Plans.

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63. Whenever upon any plan of subdivision filed or registered any portion of such subdivision is shewn as a street, lane, avenue, road, highway, park or public square, and is not designated thereon to be of a private nature, the marking or indicating on any such plan of any street, lane, avenue, road, highway, park or public square shall be deemed to be a dedication to the public of such portion thereof, for the purpose and object indicated on or to be inferred from such marking on such plan. . .

[**64**: B. C. 1911, s. 94, *ante* p. 569. M. 1902, s. 56 (2).]

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[**68**: B. C. 1911, s. 100, *ante* p. 569. M. 1902, s. 61.]

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Registration of title.

72. Every certificate of title shall be deemed and taken to be issued under and for the purpose of this Act, as soon as the same shall have been signed and sealed by the district registrar; and every instrument purporting to affect land under the new system shall be deemed to be registered, as soon as a memorial thereof endorsed thereon shall have been signed and sealed by the district registrar.

73. Every certificate of title shall issue in duplicate in the form of schedule A to this Act, and each duplicate shall have the like force and effect of the other, and each shall be known as the certificate of title; but whenever the expression "duplicate certificate of title" is used, such expression shall be held to refer exclusively to the duplicate which is not entered and bound in the register.

74. Whenever a district registrar is required to make any entry in the register, he shall make a like entry on the duplicate certificate of title, unless production thereof is dispensed with by him under the provisions of this Act.

75. In the interpretation of this Act the date of a certificate of title shall be the date appearing in the body thereof, or the date upon which the last mortgage, incumbrance or lease created under the hand of a registered owner of the land was registered, whichever shall be the later date.

76. Every certificate of title issued to an executor or administrator or trustee under a will, whether such certificate issued on the first bringing of the land under this Act, or upon a transmission or otherwise, shall describe the owner as such executor, administrator or trustee, and the will shall be deemed to be embodied in and to form part of the certificate of title; and the executor, administrator or trustee shall when so described hold the land in respect of which he is registered upon the trusts and for the purposes to which the same is subject by law, and before registering any dealing with the land the district registrar shall satisfy himself that such dealing is in accordance with such trusts or purposes.

Effect of registration of title.

78. (1) The land mentioned in any certificate of title granted under this Act shall, by implication and without any special mention in the certificate of title, unless the contrary be expressly declared, be deemed to be subject to—

[(*a*) (*b*): B. C. 1911, s. 22 (1) (*a*, *c*), *ante* p. 555. M. 1902, s. 70 (*a b*).]

(*c*) Any unregistered subsisting right of way or other easement, howsoever created, upon, over or in respect of the land;

[(*d*): B. C. 1911, s. 22 (1) (*d*), *ante* p. 556. M. 1902, s. 70 (*d*).]

(*e*) Any mechanics' lien affecting the land;

(*f*) Any order of attachment, judgment, decree, or order for the payment of money against the registered owner of the land, which may have been respectively registered since the date of the certificate of title, and which order of attachment, judgment, decree or order has been main

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tained in force under the provisions of any statute of this province from time to time relating thereto;

(*g*) Any certificate of lis pendens issued out of any court of competent jurisdiction in this province, and duly registered since the date of the certificate of title;

(*h*) Any right of expropriation by statute;

(*i*) The provisions of section 82;

(*j*) Caveats affecting the land, registered since the date of the certificate of title.

(2) All public highways embraced in the description of the land included in any certificate shall be deemed to be excluded.

79. Every certificate of title hereafter or heretofore issued under this Act shall, so long as the same remains in force and uncancelled, be conclusive evidence at law and in equity, against his Majesty and all persons whomsoever that the person named in such certificate is entitled to the land described therein for the estate or interest therein specified, subject however to the right of any person to shew that the land described in such certificate is subject to any of the exceptions or reservations mentioned in sections 78 or 82, or to shew fraud wherein the registered owner, mortgagee or incumbrancer (*sic*) has participated or colluded, and as against such registered owner, mortgagee or incumbrancee (*sic*); but the onus of proving that such certificate is so subject, or of proving such fraud, shall be upon the person alleging the same.

80. If more than one certificate of title has been issued in respect of any particular estate or interest in any land, the person claiming under the prior certificate shall be entitled to such estate or interest in such land, and that person shall be deemed to hold under a prior certificate who is the holder of, or whose claim is derived directly or indirectly from the person who was the holder of, the earliest certificate issued.

[**81**: B. C. 1911, s. 25, *ante* p. 556. M. 1902, s. 73.]

[**82, 83**: B. C. 1911, s. 22 (2, 3), *ante* p. 556. M. 1902, ss. 74, 75.]

[**84, 85**: B. C. 1911, ss. 25A, 25B, *ante* p. 556, adding at end of clause (*d*): "as against the registered owner of such other land, not being a transferee of such other land, or deriving from or through a transferee thereof, bonâ fide for value." M. 1902, ss. 76, 77.]

Registrations.

86. When land under the new system is intended to be transferred, the registered owner may execute a transfer in the form contained in schedule B to this Act, which transfer shall contain an accurate statement of the estate, interest, or easement intended to be transferred or created, and a memorandum of all leases, mortgages or incumbrances to which the same may be subject, and upon the registration of such transfer the duplicate certificate of title shall be delivered up for cancellation in whole or part.

87. Any owner of land registered under this Act may make a valid transfer to himself jointly with any other person, and the registered owners may make a valid transfer to one of their number

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either solely or jointly with some other person, and an executor or administrator may make a valid transfer to himself individually.

88. No words of limitation shall be necessary in any transfer of land in order to convey all or any title therein; but every transfer shall, when registered, operate as an absolute transfer of all such right and title as the transferor had therein at the time of its execution, unless a contrary intention be expressed in such transfer or instrument; but nothing herein contained shall preclude any transfer from operating by way of estoppel.

89. Every instrument presented for registration under the new system shall be registered in the order of time in which the same is presented for that purpose, and instruments registered in respect of or affecting the same estate or interest shall, notwithstanding any express, implied or constructive notice, be entitled to priority according to the time of registration; and the district registrar upon registration thereof shall file the same or a duplicate thereof in his office; and so soon as registered every instrument shall for the purpose of this Act be deemed and be taken to be embodied in the register as part and parcel thereof, and such instrument when so constructively embodied shall thereupon create, transfer, surrender or discharge, as the case may be, the lien, estate or interest therein mentioned in the land mentioned in the said instrument.

90. When the memorial of any instrument is entered in the register, the district registrar shall record the like memorial on the duplicate certificate or other instrument evidencing title to the land, incumbrance or mortgage intended to be dealt with or in any way affected unless the district registrar shall dispense with the production of the same; and he shall endorse on every instrument so registered a certificate of the day and minute at which the instrument was presented for registration, and shall authenticate such certificate by signing his name and affixing his seal thereto; and such certificate shall be received in all courts of law as conclusive evidence that such instrument was duly registered at the time therein mentioned, without proof of the signature or seal of the district registrar.

91. The district registrar shall have power to reject any instrument appearing to be unfit for registration, and shall not register any instrument purporting to transfer or otherwise deal with or affect any land under the new system, except in manner herein provided for registration under the new system, nor unless such instrument be in accordance with the provisions of this Act as applicable to the new system; but any instrument substantially in conformity with the schedules of this Act, or an instrument of a like nature, shall be sufficient; and no instrument shall be effectual to pass any interest in land under the new system, or to render such land liable as security for the payment of money as against any bonâ fide transferee of such land, until such instrument be registered in accordance with this Act: provided however that where an instrument in accordance with the forms in use, or sufficient to pass an estate or interest in land, under the old system, deals with land under the new system, the registrar-general may in his discretion in a proper case direct the district registrar to register it under the new system, and when so registered it shall have the same effect as to the operative parts thereof as, and shall by implication be held to contain all such covenants as are implied in, an instrument of

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a like nature under the new system; and if it is a mortgage the mortgagee may, for the purpose of foreclosure or sale under the mortgage, elect to proceed either under the provisions of this Act or as if the land were subject to the old system; but in case he proceeds under the provisions of this Act, and the mortgage covers other land not under the new system, he must before doing so bring all the land intended to be foreclosed or sold under the new system.

92. Except as in the last preceding section mentioned, and except instruments affecting land without specific description and mechanics' liens, no instrument shall be registered under the new system, unless all the land affected by such instrument be under the operation of the new system and within the same land titles district.

93. Certificates of judgment and attachment presented for registration shall be registered under both the new system and the old system.

94. Instruments executed by a registered owner and presented for registration under this Act shall be accompanied by affidavits as to execution, identity and age, and such other evidence as the district registrar may require.

95. When any instrument is presented for registration and a registered certificate of judgment appears to affect the land described in such instrument, but the applicant for registration claims that the certificate of judgment does not affect the land, or is not equitably entitled to priority over such instrument notwithstanding the priority of registration of the certificate of judgment, the district registrar may take such evidence under oath or otherwise in the matter as to him may seem sufficient, and may thereupon decide whether the certificate of judgment does or does not affect the land, or whether the certificate of judgment is or is not entitled to priority over such instrument, and may register the instrument according to such decision; provided that such decision of the district registrar shall be subject to appeal as in other cases.

96. Where land under this Act is subject to, or has as appurtenant thereto or enjoyed therewith, any rights, privileges or easements under a party wall agreement, whether the agreement was registered before or after the land was brought under this Act, such rights, privileges or easements, and all covenants relating thereto, shall be deemed to run with the land, and any instrument registered under this Act shall without special mention thereof in such instrument be deemed to be subject to, or to carry with it, all such rights, privileges, easements and covenants, to the same extent as if such instrument were made subject to, or contained an express assignment or acknowledgment of, such party wall agreement, and all rights, privileges, easements and covenants thereunder.

97. In every instrument transferring an estate or interest in land under the new system subject to mortgage or incumbrance, there shall be implied, unless otherwise expressed, the following covenant by the transferee with the transferor, that is to say, that such transferee shall pay the interest, annuity or rent-charge secured by such mortgage or incumbrance, after the rate and at the time specified in the instrument creating the same, and shall indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument, and from and against all liability in respect of any of

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the covenants therein contained, or under this Act implied, on the part of the transferor.

98. Every instrument signed by an owner, or other person claiming through or under him, purporting to pass an estate or interest in land, or to create any mortgage or incumbrance, for the registration of which provision is made by this Act, shall until registered be deemed to confer upon the person intended to take under such instrument, or others claiming through or under him, a right or claim to the registration of such mortgage, incumbrance, estate or interest.

[**99**: V. 1915, s. 179, *ante* p. 441. M. 1902, s. 91.]

100. Except as mentioned in section 76, and except in case of land held in trust for or to be used in connexion with any church, the district registrar shall not make any entry in the register containing any notice of trusts, whether express, implied or constructive; and except as in said section 76 mentioned, the describing an owner as a trustee, whether the beneficiary or object of the trust be mentioned or not, shall not impose upon the district registrar the duty of making enquiry as to the power of the owner in respect of the land, mortgage, incumbrance or charge, or the money secured thereby or otherwise, but (subject to the registration of any caveat) the land, mortgage, incumbrance or charge may be dealt with as if such description had not been inserted.

Leases.

101. When land under the new system is intended to be leased or demised for a life or lives, or for any term of years, the owner may execute a lease in the form contained in schedule C to this Act, setting forth therein all mortgages, incumbrances and liens to which the land is subject, which lease may be registered, and a certificate of title for leasehold estate may issue to the lessee.

[**102-104**: N. Z. 1915, ss. 97-99 (2), *ante* p. 490, adding at end of s. 102: "accidents and damage to buildings from fire, lightning, storms and tempest, and reasonable wear and tear, excepted"; and in s. 103 substituting "two calendar months" for "six months." M. 1902, ss. 94-96.]

Mortgages and incumbrances.

105. During the time an application is pending to bring land under this Act, any mortgage or incumbrance affecting the land may be filed with the district registrar, who may upon the issue of the certificate of title endorse thereon a memorandum of such mortgage or incumbrance; and should more than one mortgage or incumbrance be filed, they shall be entitled to priority in the order in which they have been filed.

106. Any assignment or mortgage of any mortgage or incumbrance to which land was subject when it was brought under this Act whether such assignment or sub-mortgage be made before or after the land was brought under this Act, may be made according to the forms in use under the old system, and may be registered under the new system in the same manner as other instruments of a like nature under the new system.

107. Whenever any land, mortgage or incumbrance under the new system is intended to be charged or made security in favour of any

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mortgagee, the owner shall execute a memorandum of mortgage in the form contained in schedule D to this Act, or to the like effect; and whenever such land is intended to be charged or made security for the payment of an annuity, rent-charge or sum of money in favour of any incumbrancee, the owner shall execute a memorandum of incumbrance in the form contained in schedule E to this Act, or to the like effect; and every such instrument shall contain an accurate statement of all mortgages or incumbrances affecting the same.

108. A mortgage or an incumbrance under the new system shall have effect as security, but shall not operate as a transfer of land thereby charged, or of any estate or interest therein.

109. Mortgages or incumbrances may be transferred by a transfer executed in the form contained in schedule F to this Act, and registered in the same manner as instruments of a similar nature under this Act. A mortgagee may transfer a part of the sum secured by the mortgage, and the part so transferred shall continue to be secured by the mortgage, and may be given priority over the remaining part or may be deferred, or may continue to rank equally with it under the security of the original mortgage, as may be stated in the instrument of transfer; and the district registrar shall enter on the certificate of title a memorial of the amount of the mortgage so transferred, and how the sum so transferred is to rank.

110. Upon the registration of any transfer or mortgage of a mortgage, incumbrance or lease, the mortgage or incumbrance, or the estate and interest of the transferor as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable, if named in such instrument originally as mortgagee, incumbrancee or lessee of such land, estate or interest.

111. By virtue of every such transfer or mortgage of a mortgage, incumbrance or lease, the right to sue thereupon and to recover [&c., N. Z. 1915, s. 90, *ante* p. 489. M. 1902, s. 103.]

112. Upon the production of any memorandum of discharge of mortgage or incumbrance, duly executed, discharging the whole or part of such mortgage or incumbrance, or the whole or part of the land comprised in such mortgage or incumbrance, from the moneys thereby secured, the district registrar shall make an entry in the register noting that such mortgage or incumbrance is discharged wholly or partially, or that part of the land is discharged as aforesaid, as the case may require; and upon such entry being made, such mortgage or incumbrance shall be released to the extent named in such memorandum of discharge.

[**113**: N. S. W. 1900, s. 66 (1, 2), Aust. Torr. Syst. 116. M. 1902, s. 105.]

114. The mortgagee or incumbrancee upon default [&c., V. 1915, s. 151, *ante* p. 432. M. 1902, s. 106.]

115 [Am. 1915, s. 1]. Besides his other remedies, every first mortgagee or incumbrancee for the time being shall be entitled, as often [&c., V. 1915, s. 152 *ante* p. 432, down to "such distress and sale," continuing:] After receipt of such application, the occupier or tenant shall pay over to the mortgagee or incumbrancee all rents due

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or accruing due by him from time to time in respect of his occupation of the premises, to the extent of such overdue interest or annuity, and any payment of such rent to the mortgagor or incumbrancer thereafter shall be no protection to the occupier or tenant against such right of distress, which may be exercised from time to time without the making of any fresh application, as often as any such rent shall fall due and be in arrear for seven days, until such arrear of interest or annuity and all costs of such distress or distresses shall be fully paid: provided that [&c., to end of V 1915. s. 152.]

116. In addition to and concurrently with the rights and powers conferred on a first mortgagee, every present and future first mortgagee for the time being of land under this Act shall, until a discharge [&c., V. 1915, s. 156, *ante* p. 433. M. 1902, s. 108.]

117. In so far as any limitation is imposed by the Real Property Limitation Act on the rights, remedies, or powers under mortgages, the same shall be held not to apply to mortgagees or incumbrancees in mortgages or incumbrances heretofore or hereafter made under this Act, except as to the liability under covenants for payment of any moneys secured thereby. This section shall be retroactive.

118. If default be made in the payment of the principal sum, interest, annuity or rent-charge, or any part thereof, secured by any mortgage or incumbrance registered under the new system, or if default be made in the observance of any covenant expressed in any mortgage or incumbrance or that is herein declared to be implied in such instrument, and if such default be continued for the space of one calendar month or for such longer period of time as may therein for that purpose be expressly limited, the mortgagee or incumbrancee may forthwith, after giving written notice, a copy of which shall be filed in the land titles office, to the said mortgagor or incumbrancer, his executors, administrators or assigns, and every other person appearing at the time of filing such notice in the land titles office to have any mortgage, incumbrance or lien upon, or estate, right or interest in or to the lands subsequent to such first-named mortgage or incumbrance, of his intention in that behalf, without any further consent or concurrence upon his or their part, enter into possession of the lands and receive and take the rents, issues and profits thereof, and whether in or out of possession thereof may make any lease of the same or of any part thereof as he may see fit, and may also in such notice require the mortgagor or incumbrancer, and such other interested persons as aforesaid, to pay within a time to be specified in such notice the money then due or owing on such mortgage or incumbrance, or to observe the covenants therein expressed or implied as the case may be, and that all remedies competent will be resorted to unless such default be remedied.

119 [1919, s. 2]. (1) If such default in payment or in the observance of any covenant continues for the further space of one calendar month from the date of service of such notice, such mortgagee or incumbrancee, or his transferee or assignee, may make application in writing to the district registrar for an order permitting him to sell the land so mortgaged or incumbered or any part thereof, and all the estate or interest therein of the mortgagor or incumbrancer, and of the other interested persons referred to in the last preceding section. Such application shall be accompanied by such proof of the matters stated by

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the applicant, and by such other evidence, as the district registrar may require.

(2) The district registrar may thereupon make an order authorizing and empowering the applicant to sell such lands in such manner as the district registrar may direct, and either altogether or in lots, by public auction or by private contract, or by both such modes of sale, and subject to such conditions as the district registrar may think fit.

(3) Provided that if the mortgage or incumbrance contains a provision that the sale may take place without any notice being served on any of the parties, the district registrar may order such sale to take place accordingly.

120. The mortgagee or incumbrancee may make and execute all such instruments as shall be necessary for the sale or enjoyment of the premises; and all such rules, contracts, matters and things hereby authorized shall be as valid and effectual as if the mortgagor or incumbrancer and other persons as aforesaid had made, done, or executed the same; and the receipt in writing of the mortgagee or incumbrancee shall be a sufficient discharge to the purchaser of such land, estate or interest, or of any portion thereof, for so much of his purchase money as may thereby be expressed to be received; and no such purchaser shall be answerable for the loss, misapplication or non-application, or be obliged to see to the application, of the purchase money by him paid, nor shall he be obliged to enquire as to the fact of any default or notice having been made or given as aforesaid, or how the purchase money to arise from the sale of any such land, estate or interest shall be applied. Such purchase money shall be applied, first, in payment of the expenses occasioned by such sale; secondly, in payment of the money which may then be due or owing to the mortgagee or incumbrancee; thirdly, in payment of subsequent mortgages, incumbrances or liens (if any) in the order of their priority; and fourthly, the surplus (if any) shall be paid to the owner, mortgagor or incumbrancer, as the case may be.

121. Upon the registration of any memorandum or instrument or transfer executed by a mortgagee or incumbrancee for the purpose of such sale as aforesaid, or by a mortgagee selling under the power of sale in any mortgage which affected the land when the first certificate of title issued therefor, the estate or interest of the owner of the land mortgaged or incumbered shall pass to and vest in the purchaser, freed and discharged from all liability on account of such mortgage or incumbrance, and from any mortgage, lien, charge or incumbrance created by any instrument registered subsequent thereto, and the purchaser shall be entitled to receive a certificate of title for the same.

121A [1914, s. 61. Whenever a mortgage heretofore made, purporting to be made in pursuance of the Real Property Act, contains a power of sale which provides for a sale without notice, the mortgagee, his heirs, executors, administrators, successors or assigns, shall be held to have been always entitled to take proceedings to sell under the same, according to the tenor of the power, as if the district registrar had at the time of such rule ordered the same to take place under section 119 of the said Act, provided default has continued under said mortgage for a period of ten years or more at the date of such sale: provided however that no purchaser under such power of sale shall be registered as owner unless the registrar-general shall approve of the

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sale; and all such sales in cases where certificates of title have already issued are hereby confirmed and declared valid.

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122 [1917, s. 1]. (1) Whenever default has been made in payment of the principal or interest moneys secured by a mortgage or incumbrance registered under the new or old system, or filed with the district registrar under section 105 of this Act, and such default continues for six months under new system mortgages, and for one year under any other mortgages above referred to, after the time for payment mentioned in the mortgage or incumbrance, the mortgagee or incumbrancee, or his transferee or assign, may make application in writing to the district registrar for an order of foreclosure; and such application shall state that such default has been made and has continued for the period aforesaid, and that the land mortgaged or incumbered has been offered for sale at public auction after a notice of sale served as provided by the Real Property Act or by the terms of the mortgage, and that the amount of the highest bid at such sale was not sufficient to satisfy the moneys secured by such mortgage or incumbrance, together with the expenses occasioned by such sale; and such application shall be accompanied by such proof of the matters stated by the applicant, and by such other evidence, as the district registrar may require.

(2) The district registrar shall thereupon cause to be served on the mortgagor or incumbrancer, his executors, administrators or assigns, and every other person appearing at the time of filing such application to have any mortgage, incumbrance or lien upon, or estate, right or interest in, the lands subsequent to the first-named mortgage or incumbrance, a notice requiring them within the time limited by such notice to redeem the land from said mortgage or incumbrance, which time shall not be less than one month from the date of service of such notice.

[Notice not to be served on persons whose interest ceased before foreclosure; district registrar may extend time for redemption.]

(3) Unless the district registrar shall see fit to otherwise order, the notice of intention to sell under new system mortgages, or of foreclosure proceedings under either old or new system mortgages, or the notice requiring redemption, shall be served personally on such owner, mortgagor and incumbrancer, and other persons interested as aforesaid; but in case he or they cannot after due diligence be found, the district registrar may direct service of such notice by being left on the mortgaged lands, or being sent through the post office by a registered letter directed to him or them at his or their last known address, or in such other manner as the district registrar may direct.

(4) Before the foreclosure proceedings mentioned in this section shall apply, the land affected must be made under the Real Property Act. In addition to the parties heretofore entitled to make an application to bring land under the operation of the Real Property Act, such application may in the discretion of the district registrar be made by the mortgagee or incumbrancee, or his transferee or his assign.

[**123**: V. 1915, s. 171, *ante*, p. 438. M. 1902, s. 114.]

124. For the purpose of this Act the district registrar, examiner of titles, or other officers of the land titles office, shall not have notice of or be bound by any proceedings taken by any mortgagee or incum-

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brancee under his mortgage, security or incumbrance for the purpose of foreclosing, selling or otherwise realizing upon his said security or incumbrance, unless such mortgagee or incumbrancee shall have filed a certificate of lis pendens, or in case of proceedings under power of sale, a notice of such proceedings in the land titles office for the district in which the land is situated or registered under the new system.

[**125**: V. 1915, s. 165, *ante* p. 436. M. 1902, s. 116.]

126. If default has occurred in making any payment due under any mortgage, or in the observance of any covenant contained therein, and under the terms of the mortgage by reason of such default the whole principal and interest secured thereby shall have become due and payable, the mortgagor may, notwithstanding any provisions to the contrary and at any time prior to sale or foreclosure under a mortgage, perform such covenant or pay such arrears as may be in default under the mortgage, together with costs to be taxed by the district registrar, and he shall thereupon be relieved from the consequences of non-payment of so much of the mortgage money as may not then have become payable by reason of lapse of time.

127. In every case where land is subject to a mortgage or incumbrance signed by an owner, the duplicate certificate of title shall be deposited with the district registrar, who shall retain the same on behalf of all persons interested in the land mentioned in such certificate. The district registrar shall if desired furnish to the owner of such mortgage or incumbrance a certificate of charge; and before any dealing with or discharge of said mortgage or incumbrance is registered, except in the case provided by section 125, said certificate of charge shall be delivered up to the district registrar to be cancelled: provided however that the district registrar may dispense with such production upon satisfactory evidence being produced of the loss or destruction of any such certificate.

Transmissions.

128. Wherever any land, mortgage or incumbrance under the new system becomes the subject of a transmission, the person claiming to be entitled to such transmission shall, before the registration of any dealing therewith by him, make application in writing to the district registrar to be registered as owner thereof, and the district registrar may pursuant to such application transmit such land, mortgage or incumbrance to such person; and if he become registered as owner thereof, as executor or administrator of a deceased person, he shall thereupon in case of mortgage or incumbrance be invested with all the rights and powers which the deceased owner was possessed of, and the title of the executor or administrator to such land, mortgage or incumbrance shall relate back, and take effect as from the date of the death of the deceased owner.

129. Upon any assignment being made by the owner of any land, mortgage or incumbrance for the benefit of his creditors, the assignee or trustee of such owner may register such assignment, and may at any time thereafter make an application to the district registrar to be registered as owner of any such land, mortgage or incumbrance, and the district registrar may pursuant to such application transmit any such land, mortgage or incumbrance to such assignee or trustee, who

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shall thereupon become the owner thereof, and shall be invested with all the rights and powers which the assignor was possessed of, and his title shall relate back and take effect as from the date of the assignment; but the district registrar shall not, in issuing a certificate of title to such assignee or in any entries he may make regarding any such transmission, refer to the fact that the new owner is such assignee or trustee, or that he holds any such land, mortgage or incumbrance for any other than his own absolute use, and for the purpose of any registered dealing therewith he shall be deemed to be the absolute owner thereof.

Jurisdiction of the Court.

[**130-134**: M. 1902, ss. 121-125, Can. Torr. Syst. 445, 446; the repealed s. 126 (Can. Torr. Syst. 446) is omitted from the present Act.]

Caveats after application to bring land under new system.

135. Any person claiming any estate or interest in land described in an application to bring the same under the new system may, at any time before the issue of a certificate of title therefor, file or cause to be filed on his behalf with the district registrar a caveat, in the form in schedule G to this Act, forbidding the bringing of such land under the new system.

136. The district registrar, after the receipt of such caveat, shall not bring the land under the new system until such caveat shall have been disposed of.

137. After the expiration of one month from the filing thereof such caveat shall be deemed to have lapsed, unless the person by whom or on whose behalf the same was lodged shall within that time have filed with the district registrar evidence that he has taken proceedings in court to establish his title to the land, or his right as set out in such caveat.

Caveats after land is brought under new system.

138. Any person claiming an estate or interest in land, mortgage or incumbrance under the new system may file or cause to be filed on his behalf with the district registrar a caveat, in the form in schedule H to this Act, forbidding the registration of any person as transferee or owner of, or of any instrument affecting such estate or interest, or unless such instrument be expressed to be subject to the claim of the caveator.

139. Except in the case of a caveat lodged by the district registrar, every caveat lodged against any land, mortgage or incumbrance under the new system shall be deemed to have lapsed upon the expiration of fourteen days after notice given to the caveator to take proceedings in court on his caveat, unless before the expiration of the said period of fourteen days the caveator appears before the court or a judge, or a judge in chambers, and gives such undertaking or security or lodges such sum in court as such court or judge may consider sufficient, to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, or gives such security or lodges such sum in court as such court or judge may consider sufficient, to answer the costs of the caveator in such

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proceedings as may be taken under such caveat; but then and in such case such court or judge may by order direct the district registrar to delay registering any dealing with the land, mortgage or incumbrance for a further period to be specified in such order, or may direct the caveator to proceed upon his caveat, or may make such other order as may be just.

[**140**: B. C. 1911, s. 65, *ante* p. 564. M. 1902, s. 132.]

Caveats generally.

141. (1) Every caveat filed with the district registrar shall state the name and addition of the person by whom or on whose behalf the same is filed, and except in the case of a caveat filed by the district registrar shall be signed by the caveator, his attorney or agent, and shall state some address or place within the province of Manitoba at which notices and proceedings relating to such caveat or the subject-matter thereof may be served, and the nature and particulars of the title, estate, interest or lien under which the claim is made, and shall be supported by an affidavit or statutory declaration stating that in the belief of the deponent the person by whom or on whose behalf the caveat is filed has a good and valid claim upon the land, mortgage or incumbrance intended to be affected by the same, and that the caveat is not filed for the purpose of delaying or embarrassing the applicant or owner or any person claiming through him, which affidavit or declaration may be in the form in schedule K hereto.

(2) The district registrar shall not file any caveat which does not fully meet all the requirements of this section.

[**142, 143**: Fi. 1876, s. 93 (8, 11), Aust. Torr. Syst. 686, adding "and damages" after "*costs.*" M. 1902, ss. 134, 135.]

144. Every caveat, except a caveat filed by the district registrar, shall be deemed to have lapsed after the expiration of the time limited by the preceding sections of this Act as to caveats, so far as applicable respectively, unless the person by whom or on whose behalf the same was lodged shall within that time have filed with the district registrar evidence to his satisfaction of proceedings having been taken under his caveat as prescribed by this Act.

145. Notwithstanding anything in this Act contained, a caveator may take proceedings under his caveat at any time after the expiration of the time limited by the preceding sections for so doing, provided he shall do so and furnish evidence thereof to the district registrar before he shall have disposed of the caveat so lapsed.

146. In the case of any caveat filed, except a caveat filed by the district registrar, the applicant or owner may at any time before the caveator has taken proceedings thereunder apply to the court or a judge, or a judge in chambers, on motion calling upon the caveator to shew cause why such caveat should not be discharged; and upon the hearing of such motion the said court or a judge may make such order in the premises, and as to costs, as to such court or judge may seem just.

147. In every case in which a caveat has been disposed of the district registrar may at once proceed as if no caveat had been filed, unless in the meantime he shall have been served with an order of the court or of a judge staying such proceedings.

[**148**: B. C. 1911, s. 67A, *ante* p. 564.]

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149. In the case of a caveat filed by the district registrar, the applicant or owner may apply to the court or a judge, on notice of motion to be served upon the person on whose behalf such caveat has been filed, for an order that such caveat should be withdrawn or discharged. . . .

150. At any time before the expiration of the time limited for proceeding upon a caveat, upon application on behalf of the caveator after notice to the caveatee, the court or a judge thereof, for sufficient cause shewn and subject to such conditions as may seem proper, may extend the time for proceeding under such caveat for a further period to be specified in the order made upon such application, which order shall forthwith be filed in the land titles office.

151. The filing of a caveat by the district registrar, or by any caveator, shall give the same effect as to priority to the instrument or subject-matter on which said caveat is based, as the registration of any instrument under this Act; and the district registrar may in his discretion allow the withdrawal of such caveat at any time, and the registration in lieu thereof of the instrument under which the person on whose behalf the caveat was filed claims his title or interest; and if the withdrawal of such caveat and the registration of such instrument be simultaneous, the same priority shall be preserved to all rights under the instrument as the same rights were entitled to under the caveat.

152. A caveator may take proceedings prescribed under schedule L hereto, or such other proceedings in court as he may desire, to establish his claim under his caveat.

153. Any person claiming any estate or interest in land, mortgage or incumbrance subject to or under the new system may, in lieu of or after filing a caveat, proceed by way of statement of claim, and may file with the district registrar a certificate of lis pendens or other proper evidence of such proceedings.

Assurance fund.

154. Any person sustaining loss or damage through any omission, mistake or misfeasance of the district registrar in the execution of his duties under this Act, and any person deprived of any land, mortgage or incumbrance, or of any estate or interest therein, through the bringing of the same under the new system, or by the registration of any other person as owner of such land, mortgage or incumbrance, or by any error, omission or misdescription in any certificate of title, and who by the provisions of this Act is barred or in any way precluded from bringing an action for the recovery of such land, mortgage or incumbrance, or interest therein, may bring an action against the district registrar of the district in which the land is situate for the recovery of damage. If such action be for the recovery of loss or damage arising only through any omission, mistake or misfeasance of the district registrar in the performance of his duties under this Act, then such district registrar shall be the sole defendant in such action; but if such action be brought for loss or damage arising only from the fraud or wrongful act of some person other than the district registrar, or arising jointly through the fraud or wrongful act of such other person and the omission, mistake or misfeasance of the district regis-

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trar, then such action shall be brought against both the district registrar and such other person. In all such actions, where there is a defendant other than the district registrar, and damages shall have been recovered, and the court shall find that some defendant or defendants other than the district registrar is liable for the loss so sustained or ought to pay the same, final judgment shall not be entered against the district registrar until a judge of the court in which such action was brought shall have made an order, declaring that such judgment is not and cannot be satisfied in whole or in part out of the goods or lands of such other defendant or defendants so found liable as aforesaid, and that the amount of such judgment, in whole or as to such part as remains unsatisfied, together with costs, should be a judgment against the district registrar defendant, and judgment may thereupon be entered against the district registrar; and upon payment of the amount of such judgment the provincial treasurer shall be entitled to an assignment thereof as against any other such defendant or defendants so liable as aforesaid. The expression "district registrar," where it occurs in the 2nd, 15th, 16th, 20th and 22nd lines of this section shall include the district registrar and any deputy, official or clerk in his office.

155. No action shall be brought against a district registrar under the last preceding section unless notice of such action, and of the cause thereof, shall be served upon such district registrar and the attorney-general at least one calendar month before the commencement of such action.

156. The provincial treasurer shall pay the amount of any judgment recovered against a district registrar out of the assurance fund provided for by this Act, and if there shall not be sufficient funds at the credit of the assurance fund to satisfy such judgment, then the amount thereof shall be satisfied out of the public funds of the province.

[**157**: B. C. 1911, s. 129, *ante* p. 574. M. 1902, s. 149.]

158. No action for recovery of damages under this Act shall lie or be sustained against a district registrar, or against the person by whose fraud, error, omission, misrepresentation, misdescription or wrongful act the person entitled to the land or some estate or interest therein has been deprived thereof, unless such action be commenced within the period of ten years from the date of such deprivation; provided nevertheless that any person being at the time of such deprivation under the disability of infancy or unsoundness of mind shall bring such action within five years from the date on which such disability shall have ceased, or within ten years from the date of such deprivation, whichever shall be the later date.

159. A district registrar shall not under any circumstances be liable for compensation for any loss, damage or deprivation occasioned by the breach by a registered owner of any trust, whether express, implied or constructive.

[**160**: N. Z. 1915, s. 188 (2), *ante* p. 505. M. 1902, s. 152.]

161. It shall in all cases be a bar to the bringing of any action against a district registrar that the plaintiff in such action, or the person through or under whom he claims, was served under the provisions of this Act with notice, or not being served with notice had knowledge, that the district registrar was about to bring the land in

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respect of which the action is brought under the Act, or was about to commit the act through which the plaintiff claims to have been damnified.

162. Upon the first bringing of land under the new system there shall be paid one-tenth of one per cent. in case of an original grantee where no transaction or instrument affecting the land has been registered except mortgages or leases, but in other cases one-quarter of one per cent. of the value thereof.

. . . . .

General provisions.

. . . .

[**165**: V. 1915, s. 176, *ante*, p. 439. M. 1902, s. 157.]

166. Any person may under power of attorney authorize any other person to act for him in respect of the transfer or other dealing with any land, mortgage or incumbrance. No power of attorney shall be deemed revoked, by act of the party or by death, until a revocation thereof shall have been registered with, or notice of death given or become known to, the district registrar with whom the power of attorney or any certified copy thereof is registered.

[**167**: V. 1915, s. 270, *ante* p. 460. M. 1902, s. 159.]

170. Proceedings under this Act shall not abate or be suspended by death, or transmission, or change of interest; but in any such event the district registrar may, upon the application of any person interested make such order for carrying on, discontinuing or suspending the proceedings as under the circumstances may be just, and may for that purpose issue a certificate of title to a deceased person.

171. If any person die after the execution of any instrument affecting land, and before registration thereof, the registration of such instrument may nevertheless be proceeded with in accordance with this Act, and shall be valid notwithstanding such death.

. . . . . .

SCHEDULES.

. . . .

Schedule L (Section 152).

Rules and regulations for procedure in the matter of caveats.

[A close adaptation of S. A. 1886, sch. 21, Aust. Torr. Syst. 414. 415. M. 1902, sch. L.]

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SASKATCHEWAN.

LAND TITLES ACT 1917

(1917 (Sess. 2), c. 18).

NOTE.—This Act is a revising or consolidating statute, replacing the 1909 Act and its amendments, and is itself amended by an Act of 1919. Except as regards the purely procedural enactments, most of the repealed sections have been re-drafted and re-arranged, a few have not been reproduced at all, and in many instances amendments have been made. In view of these features, and of the recent date of its coming into operation, nearly the whole of the Act has been printed (incorporating the 1919 amendments), and only those sections in other statutes have been referred to which are almost verbally identical with the omitted sections. For the procedural sections that have undergone little or no alteration, reference is made to the repealed statute and its amendments as printed in Can. Torr. Syst. 465 *et seq.*

An Act respecting Land and the Title thereto.

[*Assented to December 15th, 1917.*]

. . . . . .

Interpretation.

2. In this Act, unless the context otherwise requires, the expression:

1. "Land" or "lands" means lands [M. 1913, s. 2 (1), *ante* p. 579.]
2. "Owner" means a person or body corporate entitled to a freehold or other estate or interest in land, at law or in equity, in possession, in futurity or expectancy;
3. "Transfer" means the instrument by which one person conveys to another an estate or interest in land under this Act;
4. "Lease" includes a sub-lease, and "lessee" has a corresponding meaning;
5. "Mortgage" means a charge on land created for securing a debt or loan, or an hypothecation of such charge;
6. "Mortgagee" means the owner of a mortgage; and "mortgagor" means the owner or transferee of land, or of an estate or interest in land, mortgaged;
7. "Incumbrance" means a charge on land created or effected for any purpose whatever, inclusive of mortgages, mechanics' liens and executions against lands;
8. "Incumbrancer" means the owner of land, or of an estate or interest in land, subject to an incumbrance; and "incumbrancee" means the owner of an incumbrance;
9. "Lunatic" means a person found by a competent tribunal to be a lunatic;
10. "Instrument" means a grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or exempli-

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fication thereof, letters of administration or an exemplification thereof, mortgage or incumbrance, or any other document in writing relating to or affecting the transfer of or other dealing with land or evidencing title thereto;

11. "Registration" means:
    (*a*) bringing lands under the provisions of this Act;
    (*b*) entering upon the certificate of title a memorandum, authorized by this Act, of any document;
12. "Filing" means entering an instrument in the day book;
13. "Certificate of title' means the certificate (form A) granted by the registrar, and entered and kept in the register;
14. "Duplicate" or "duplicate certificate" means the duplicate of the certificate of title in the register, delivered or issued to the person entitled thereto;
15. "Registrar" means a registrar of land titles, or a deputy registrar, or the master of titles, or deputy master when acting as registrar;
16. "Court" means Court of his Majesty's King's Bench for Saskatchewan;
17. "Judge" means a judge of the said court, or the master in chambers, or local master in chambers;
18. "Transmission" means the passing of the title to land in any manner other than by transfer from the registered owner;
19. "Grant" means a grant of Crown land, whether in fee or for years, and whether direct from his Majesty or pursuant to the provisions of a statute;
20. "Endorsement" means anything written by the registrar upon an instrument or upon a paper attached thereto, and "endorsed" means so written;
21. "Possession," when spoken of persons claiming title to land, includes the receipt of the rents and profits thereof.

PART I. Organization of System.

Registration districts.

3. For the purpose of this Act there shall be in Saskatchewan ten land registration districts, with boundaries as set forth in the first schedule hereto.

4. The Lieutenant Governor in Council may from time to time by proclamation, as the settlement of the country and the exigencies of the public service require, constitute any portion of Saskatchewan a land registration district, and declare by what name the same shall be known and designated, and may also change the boundaries of existing districts.

5. (1) In each registration district, at such place as the Lieutenant Governor in Council determines, there shall be an office called the "land titles office."

(2) The Lieutenant Governor in Council may provide in each registration district at the public expense, and may thereafter maintain in a proper state of repair, the necessary building to serve as a land titles office.

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6. The Lieutenant Governor in Council may close, in whole or in part, any registration district, or add to one district territory taken from another, and may direct that the books, records, and instruments in the possession of the registrar of the closed district, or affecting land in the part transferred, as the case may be, shall be deposited with the registrar of the district to which the land to which they relate has been added, at such times and in such manner as may be expedient.

7. Until the actual establishment of an office in a new registration district, all registrations made in the offices of the district or districts from which the territory comprising such new district was set apart shall be and are hereby declared always to have been as valid as if made in such new district when fully established.

Officials.

8. The Lieutenant Governor in Council may from time to time appoint a master of titles who shall inspect the books and records of the several land titles offices, and perform such other duties as may be assigned to him by this Act or by the attorney general; and the said master may be required to perform any duty which a registrar is by this Act empowered to perform.

9. (1) The Lieutenant Governor in Council may also appoint a deputy master of titles, to assist the said master under instructions from the latter.

(2) Such deputy may, in the event of the illness or absence from office of the master of titles, perform all the duties of such master.

(3) In case of the death, resignation, or removal from office of the master of titles, the deputy may perform all his duties until another master of titles is appointed.

10. No person shall be appointed master or deputy master of titles, unless he is when appointed a barrister and solicitor of at least three years' standing of the province of Saskatchewan.

11. (1) The Lieutenant Governor in Council may from time to time appoint a chief surveyor of land titles offices, with such assistants as the business of the offices may require.

(2) No person shall be appointed chief surveyor, unless he is a Saskatchewan land surveyor of at least three years' standing.

(3) The chief surveyor shall perform such duties in connection with plans and surveys and descriptions of land as may be prescribed by this Act, or any regulation made thereunder, or as he may be required to perform by the master of titles.

12. (1) The business of each land titles office shall be conducted by an officer called the registrar, appointed by the Lieutenant Governor in Council, with such other officials and clerks as are necessary, and as the Lieutenant Governor in Council from time to time appoints.

(2) No person shall be appointed a registrar, unless he is a barrister of the province of Saskatchewan, or unless he has been employed as a deputy registrar in a land titles office in Saskatchewan for a period of at least three years.

13. (1) Whenever occasion requires, the Lieutenant Governor in Council may from time to time appoint one or more deputy registrars, to assist a registrar under instructions from the latter.

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(2) The deputy registrar may, in the event of the illness or absence from office of the registrar, perform all the duties required by this Act to be done by the registrar.

(3) In case of the death, resignation, or removal from office of the registrar, the deputy registrar shall do and perfom all the duties of a registrar under this Act until another registrar is appointed.

14. No person shall be appointed a deputy registrar, unless he is a barrister and solicitor of the province of Saskatchewan, or unless he has been employed for a period of at least three years in a land titles office in Saskatchewan.

15. The master of titles, the deputy master of titles, the registrars, deputy registrars and other necessary officers shall be attached to the department of the attorney general and be under his control; and their salaries and such incidental expenses of carrying out the provisions of this Act as are sanctioned by this Act, or by the Lieutenant Governor in Council, shall be paid out of moneys provided by the Legislature of the province, and they shall hold office during pleasure.

16. Neither the master of titles, the deputy master of titles, nor any registrar, deputy registrar, or clerk in a land titles office shall:

(*a*) directly or indirectly act as the agent of any person investing money and taking securities on land, within Saskatchewan;

(*b*) advise for any fee or reward, or otherwise than in an official capacity, upon titles to land;

(*c*) practise as a barrister, solicitor or conveyancer; or

(*d*) carry on or transact within the land titles office any business or occupation whatever other than his duties as such master, deputy master, registrar, deputy registrar or clerk.

17. No master of titles, deputy master of titles, chief surveyor, registrar or deputy registrar, or any person acting under authority of a registrar, shall be liable to an action or proceeding for or in respect of any act bona fide done or omitted to be done in the exercise or supposed exercise of the powers given by this Act, or by any order or general rule made in pursuance thereof, except as hereinafter provided.

18. The master of titles, chief surveyor and each registrar shall have a seal of office approved by the Lieutenant Governor in Council. The registrar shall seal all certificates of title.

19. In matters respecting the title to land the master of titles, the deputy master of titles, or any registrar or deputy registrar within the district to which he is appointed, may administer any oath, or take any affirmation or declaration in lieu of an oath, from anyone entitled by law to affirm or declare.

20. Every registrar shall, when required, furnish under seal copies and abstracts of any instruments affecting lands which are deposited, filed, or registered in his office, and every such certified copy shall be received as evidence in the same manner and with the same effect as if the original were produced.

21. Every land titles office, except in the Cannington, Moosomin and Yorkton land registration districts, shall be opened on all days except Sundays and legal holidays at ten o'clock in the forenoon, and kept open until four o'clock in the afternoon, except on Saturdays, when it shall be closed at one o'clock in the afternoon.

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22. The land titles offices in the Cannington, Moosomin and Yorkton land registration districts shall be opened on all days except Sundays and legal holidays at nine o'clock in the forenoon, and kept open until three o'clock in the afternoon, except on Saturdays, when they shall be closed at twelve o'clock noon.

23. The registrar shall keep a book called the "receiving book" in which he shall enter a record of all instruments received by him.

24. (1) The registrar shall stamp all instruments presented to him for filing or registration, showing the day, hour, and minute of receiving the same, and shall immediately enter a record of the same in the receiving book.

(2) The said instruments shall then be examined and, if found to be complete and in proper form and fit for filing or registration, shall be entered in the day book as hereinafter provided as of the day, hour, and minute shown in the receiving book. If the instruments are found not to be complete and in proper form, or appear to be unfit for filing or registration, the registrar shall reject and return same.

25. (1) The registrar shall keep a book to be called the "day book," in which every instrument relating to lands, which has been found by the registrar to be complete and in proper form, shall be entered by a short description, with the day, hour, and minute of its being presented.

(2) For purposes of priority between mortgagees, transferees and others, the time so entered shall be taken as the time of registration.

26. The registrar, in entering memoranda upon the certificate of title embodied in the register, and in endorsing memoranda upon the duplicate, shall take the time from the day book as the time of registration.

27. (1) The registrar shall also keep a book to be called the "register," and shall enter therein all certificates of title, and shall record therein the particulars of all instruments, dealings, and other matters by this Act required to be registered or entered in the register, and affecting the land included in such certificate of title.

(2) Each certificate of title shall constitute a separate folio of such book.

28. The registrar shall also keep a book to be called the "general register," in which he shall enter in alphabetical order, under the name of the grantor, every instrument (except executions) entered in the day book relating to lands in which the land affected thereby is not specifically described, with the date of execution thereof, the names of the parties thereto, and the day, hour, and minute of its receipt by him.

29. The registrar shall also keep a book to be called the "execution register," in which he shall enter in alphabetical order, under the name of the execution debtor, every writ of execution and renewal thereof received and entered in the day book, with the date and amount thereof, the parties thereto, and the day, hour, and minute of its receipt by him, the name of the judicial district to whose sheriff the writ is directed, and any other particulars required by this Act.

30. The attorney general shall, from time to time, provide all such books, forms and other office requisites as are necessary for use under the provisions of this Act.

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PART II. REGISTRATION AND ITS EFFECT.

Applications to bring under the Act.

31. (1) The owner of an estate or interest in land, whether legal or equitable, may by himself or his duly authorized agent or attorney apply to have his estate or interest, or the whole title to the land, registered under this Act.

(2) The registrar may, in his discretion, refuse to entertain such application unless all persons interested in the land, other than the applicant, are consenting parties thereto.

(3) If, at the time of the grant of the certificate of title, there are no filed or registered instruments affecting the land, the certificate may be granted upon payment of such fees as are fixed in that behalf by tariff made from time to time by the Lieutenant Governor in Council, but no fees shall be payable therefor under the provisions of this Act relating to the assurance fund.

32. (1) The application therefor shall be made in writing to the registrar of the registration district in which the land is situate (form B), and shall be verified by affidavit of the applicant, or some one on his behalf (form C).

(2) The application shall be accompanied by:

(*a*) all deeds (if any) in possession of the applicant;

(*b*) a certificate showing all instruments affecting the title in the land titles office down to the time when said application is filed, with the copies of any documents in the said office the original whereof the applicant is unable to produce.

(3) It shall not in any case be necessary for an applicant to produce copies of a document the original whereof is, at the time of the application, of record in the office of the registrar to whom the application is made.

(4) Where the title to land embraced in an application passed to the Hudson's Bay Company before the first day of January 1887, either by notification under the Dominion Lands Act or by letters patent issued thereunder, and where the application is accompanied by an affidavit of an officer of the company approved by the attorney-general (form D), it need not be accompanied by such notification or letters patent.

33. Upon the filing of such application:

(*a*) if the applicant is the original grantee from the Crown, and no instrument affecting the title to the land is of record in the land titles office; or

(*b*) if the applicant is not the original grantee, but all the original deeds are produced, and no person other than the applicant is in actual possession of the land, and no caveat has been filed;

the registrar, upon being satisfied as to the title of the applicant, shall grant a certificate of title as hereinafter provided.

34. If there is any mortgage or other incumbrance against the land at the date of such application, the filing with the registrar of the original mortgage, or of the instrument creating the incumbrance, or a copy of either, having endorsed thereon or attached thereto a discharge, signed by the mortgagee or incumbrancee, accompanied by

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the affidavit of an attesting witness, shall operate as a discharge of the security created by such mortgage or incumbrance.

35. If any person other than the applicant appears, by admission or otherwise, to be interested in the land, and the applicant desires to have his title registered subject to the interest of such other person, and such interest arises by virtue of a mortgage, lease, or charge created by any other instrument, and such instrument is at the time of the application of record in the office of the registrar to whom application is made, or is then produced to him, the registrar may, if satisfied as to the extent and nature of interest or of the title of the applicant, register the title, and grant a certificate of title and issue a duplicate certificate, subject to such interest.

36. Where the person who so appears to be interested is a consenting party to the application, and his consent is in writing signed by him in presence of a witness, and attested in the manner required by this Act for the attestation of instruments not under seal, the registrar may, if satisfied as to the title of the applicant, grant a certificate of title subject to the terms of the consent.

37. In all cases other than those provided for in the four last preceding sections, the registrar shall forthwith, on giving the applicant a certificate of the filing of his application, transmit the application with all evidence supplied to the master of titles to be dealt with as hereinafter mentioned.

38. The master of titles shall examine without delay all titles so submitted, and for such purpose shall when necessary hear all persons interested or claiming to be interested, and shall hear and consider the claims as against the applicant of any person who is in possession of the land; and he shall have and exercise all the powers of a judge for compelling the attendance of witnesses and the production of documents.

39. (1) If the master of titles finds that some person other than the applicant has, or appears to have, some right or claim to or against the land in question, he may of his own motion issue a notice, and cause such person to be served with a copy thereof, to the effect that a certificate of title will issue pursuant to the application, unless the person appearing to have such right or claim shall, within the time limited by the notice, file and serve an adverse claim in accordance with the next following section.

(2) The master of titles shall by such notice limit a reasonable time for such filing and service, and he may extend the same from time to time as he may deem expedient.

40. Any person having an adverse claim, or a claim not recognized in the application for registration, may, at any time before the master of titles has approved of the applicant's title, file with the master of titles a short statement of his claim verified by affidavit, and in such case he shall serve a copy thereof on the applicant, his solicitor or agent.

41. If an adverse claim is filed, the master of titles shall examine into and adjudicate thereon, and no certificate of title shall be granted until such adverse claim has been disposed of.

42. The master of titles may in any case direct that notice of the application be published in some newspaper or newspapers, in such form and for such period as he thinks expedient, and no order for

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registration shall be granted by him until after the expiration of at least four weeks from the first publication of the notice, if he has directed the same to be published.

43. The master of titles, if satisfied with the applicant's title, shall make an order directing the registrar after the expiration of four weeks from the date thereof, unless in the meantime the order is appealed from, to register the same.

44. After the registration of a title, the registrar shall make out, sign, officially seal, and deliver to the owner or his duly authorized agent, a duplicate of the certificate of title in the register, on which shall be entered all memoranda endorsed on or attached to the certificate of title.

45. (1) An applicant may, upon such terms as to the registrar or master of titles seem proper, withdraw his application as to the whole or any part of the land comprised therein, at any time prior to the issue of the certificate of title.

(2) In case of such withdrawal, if a caveator has been put to expense without sufficient cause by reason of the application, the caveator shall receive such compensation as the master of titles may allow.

Registration.

46. (1) When land in Saskatchewan is granted by the Crown, the letters patent therefor, when received by the registrar of the registration district in which the land so granted is situated, shall be retained by him, and a certificate of title and duplicate thereof as provided by this Act, with any necessary qualification, shall be granted to the patentee upon payment of such fees and charges as may be prescribed by the Lieutenant Governor in Council.

(2) No fees or charges shall be payable upon the issue of a duplicate certificate of title to a person who has obtained a patent under a homestead entry, in accordance with the provisions of an Act of the Parliament of Canada known as the Dominion Lands Act, unless at the time such duplicate certificate of title is issued there are instruments registered or filed which incumber or affect the title, in which case such duplicate certificate shall be issued upon the payment of such fees as are fixed, or may from time to time be fixed, by the Lieutenant Governor in Council.

47. The notification to the Hudson's Bay Company by the minister of the interior, under the provisions of the Dominion Lands Act, of the survey and confirmation of the survey of any township or part of a township, shall be accepted by a registrar as equivalent to, and be dealt with by him in all respects in the same manner as if the said notification were, letters patent to and in favour of the said company, granting to it in fee simple the sections or portions of sections to which it is entitled in such townships or parts of townships, under the provisions of the Dominion Lands Act.

48. A notification to the registrar from the minister of the interior that land described therein has been granted to the Canadian Pacific Railway Company, or to any other railway company entitled to Dominion lands under the authority of an Act of Parliament, shall be accepted by the registrar and dealt with by him in all respects as if the same were letters patent in favour of such company.

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49. (1) Every grant shall be deemed to be registered under the provisions of this Act, when it has been marked by the registrar with the folio and volume on and in which it is embodied in the register.

(2) Every other instrument shall be deemed to be registered, when a memorandum of it has been entered in the register upon the folio constituting the existing certificate of title.

50. Unless required so to do by order of the court or a judge or the master of titles, and except as provided in the following section, the registrar shall not enter an instrument in the day book until the duplicate certificate of title for the lands affected is produced to him, so as to enable him to enter the proper memorandum on such duplicate.

51. A duplicate certificate of title for the lands affected need not be produced in the case of:

(*a*) executions against lands, caveats, mechanics' liens, assignments for the general benefit of creditors under the Assignments Act, transfers by a sheriff or by order of a court or a judge;

(*b*) applications for title by tax sale purchasers or their assigns, or transfers on sales of lands for taxes, maps or plans which do not require to be registered, or certificates or orders of a court or a judge or the master of titles, or a certificate of lis pendens under the seal of the court and the hand of the clerk or the registrar or local registrar thereof;

(*c*) a mortgage or other incumbrance created by any person rightfully in possession of land prior to the issue of the grant from the Crown, or prior to the issue of transfer from the Hudson's Bay Company, or from any company entitled to a grant of such lands from the Crown, or to which letters patent from the Crown for such mortgaged or incumbered lands have already issued but for which no certificate of title has been issued, if there is produced to and left with the registrar with the mortgage or incumbrance an affidavit made by the mortgagor or incumbrancer (form E); and also in the case of lands mortgaged prior to the issue of transfer from the Hudson's Bay Company, or other company as aforesaid, a certificate from the land commissioner or other proper officer of such company that the purchase price of such mortgaged lands has been paid, and that the applicant is entitled to a transfer in fee simple therefor from such company;

(*d*) a transfer under power of sale in a mortgage given under section 110 of this Act by a mortgagee, or an order for foreclosure given under section 114 by the registrar.

52. (1) Upon every transfer of ownership, the certificate of title of the transferor, and the duplicate thereof, shall be cancelled in respect of the land transferred, and the certificate of title of the transferee shall thereupon be entered upon a new folio in the register.

(2) The registrar shall note upon the folio of the title of the transferor the number of the folio of the transferee's title, and upon that of the transferee the number of the folio of the transferor, so

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that reference can be readily made from one to the other as occasion requires.

(3) There shall not be included in a certificate of title lands in more than one township.

(4) In no case shall a certificate of title issue for more than one hundred lots, or for lots in more than one subdivision, or for unsubdivided lands which are not contiguous, or which contain more than 640 acres: provided that lands shall be deemed contiguous that are part of the same section, or are separated only by a highway, railway, right of way or private road.

53. The registrar shall retain in his office every registered instrument.

54. (1) Every memorandum entered in the register shall state the nature of the instrument to which it relates, the day, hour, and minute of its registration, and the names of the parties thereto, shall refer by number or symbol to such instrument, and shall be signed by the registrar.

(2) When a memorandum has been entered in the register. the registrar shall make a like memorandum upon the duplicate, when the same is presented to him for the purpose, and shall sign and seal such memorandum.

(3) Such memorandum shall be received in all courts of law as conclusive evidence of its contents, and that the instrument of which it is a memorandum has been duly registered under the provisions of this Act.

55. Where an instrument in accordance with the forms in use, or sufficient to pass an estate or interest in land, under a system of land registration other than that created by this Act, deals with land outside Saskatchewan and also with land in Saskatchewan, the master of titles may in his discretion direct the registrar to register it under this Act against land in such instrument specifically described, and when so registered, it shall have the same effect as to the operative parts thereof as an instrument of a like nature under this Act, and shall by implication be held to contain all such covenants as are implied in such an instrument, and if it is a mortgage the mortgagee may, for the purpose of foreclosure or sale under the mortgage, elect to proceed under the provisions of this Act.

Attestation of instruments.

56. Every instrument executed within the limits of Saskatchewan, except instruments under the seal of a corporation, caveats, mechanics' liens, orders of a court or judge, the master of titles, or registrar, executions or certificates of judicial proceedings attested as such, requiring to be registered or filed under this Act, shall be witnessed by one person, who shall sign his name to the instrument as a witness, and who shall appear before the master of titles, or the registrar or deputy registrar of the registration district in which the land is situated, or before a judge, notary public, commissioner for oaths, or justice of the peace in and for Saskatchewan, and make an affidavit (form F).

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57. (1) Every instrument executed without the limits of Saskatchewan, except grants from the Crown, orders in council, instruments under the seal of a corporation, caveats or mechanics' liens, required to be registered or filed under the provisions of this Act, shall be witnessed by one person, who shall sign his name to the instrument as a witness, and who shall appear and make an affidavit (form F) before one of the following persons:

(*a*) If made in any province in Canada, before a judge of a court of record, a commissioner authorized to take affidavits in such province for use in any court of record in Saskatchewan, or before a notary public under his official seal; or

(*b*) if made in Great Britain or Ireland, before a judge of the Supreme Court of Judicature in England or Ireland, or of the Court of Session or of the Judiciary Court in Scotland, or a judge of any of the county courts within his county, or the mayor of a city or incorporated town under the common seal of such city or town, or before a commissioner in Great Britain or Ireland authorized to take affidavits therein for use in any court of record in Saskatchewan, or a notary public under his official seal; or

(*c*) if made in any British colony or possession out of Canada, before a judge of a court of record, the mayor of a city or incorporated town under the common seal of such city or town, or a notary public under his official seal; or

(*d*) if made in any foreign country, before the mayor of any city or incorporated town under the common seal of any such city or town, or before the British consul, vice consul or consular agent residing therein, or before a judge of a court of record, or a notary public under his official seal.

(2) Notwithstanding anything herein contained, the registrar may register any instrument purporting to be executed by a person in the military or naval service of Great Britain or any of her allies in time of war, if the affidavit of attestation purports to be sworn before a commissioned officer. In such cases the officer before whom the affidavit is sworn shall state his name, rank and the company, regiment, battalion or corps to which he is attached.

Effect of registration.

58. (1) After a certificate of title has been granted, no instrument shall until registered pass any estate or interest in the land therein comprised, except a leasehold interest not exceeding three years where there is actual occupation of the land under the same, or render such land liable as security for the payment of money, except as against the person making the same.

(2) Every instrument shall become operative according to the tenor and intent thereof when registered, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land, estate or interest therein mentioned.

59. The owner of land for which a certificate of title has been granted shall hold the same subject, in addition to the incidents

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implied by virtue of this Act, to such incumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title, absolutely free from all other incumbrances, liens, estates or interests whatsoever, except in case of fraud wherein he has participated or colluded, and except the estate or interest of an owner claiming the same land under a prior certificate of title, as mentioned in section 174.

60. The land mentioned in any certificate of title granted under this Act shall, by implication and without any special mention therein, unless the contrary is expressly declared, be subject to:

(*a*) any subsisting reservations or exceptions contained in the original grant of the land from the Crown;

(*b*) all unpaid taxes, and the rights of purchasers at tax sales;

(*c*) any public highway or right of way, or other public easement howsoever created upon, over, or in respect of the land;

(*d*) any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land under the same;

(*e*) any decrees, orders, or executions against or affecting the interest of the owner in the land, which have been filed and maintained in force against the owner;

(*f*) any right of expropriation which may by statute or ordinance be vested in any person, body corporate or his Majesty;

(*g*) any right of way or other easement, granted or acquired under the provisions of the Irrigation Act;

(*h*) the provisions of section 61;

(*i*) liens in favour of his Majesty for advances of seed grain, fodder, or other goods by way of relief.

61. (1) Every certificate of title shall be void as against the title of any person adversely in actual occupation of, and rightly entitled to, the land at the time when such land was brought under this Act.

(2) After land has been brought under this Act, no title thereto adverse to or in derogation of the title of the registered owner shall be acquired by possession: provided however that nothing contained in this section shall operate to affect prejudicially any right or interest in land acquired prior to the nineteenth day of December 1913.

62. (1) No memorandum or entry shall be made upon a certificate of title, or upon the duplicate thereof, of any notice of trusts, whether express, implied or constructive.

(2) The registrar shall treat any instrument containing any such notice as if there was no trust, and the trustees therein named shall be deemed to be the absolute and beneficial owners of the land for the purposes of this Act.

63. Instruments registered in respect of or affecting the same land shall be entitled to priority, the one over the other, according to the time of registration, and not according to the date of execution.

64. (1) In every instrument transferring, mortgaging, or incumbering land for which a certificate of title has been granted there shall be implied the following covenant by the transferor, mortgagor or incumbrancer, that is to say: That he will do such acts and execute

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such instruments as, in accordance with the provisions of this Act, are necessary to give effect to all covenants, conditions, and purposes expressly set forth in such instrument, or by this Act declared to be implied therein against such person.

(2) Save as in the Assignments Act or in any other Act provided, in every instrument transferring land for which a certificate of title has been granted subject to mortgage or incumbrance, there shall be implied a covenant by the transferee with the transferor that the transferee will pay the principal money, interest, annuity or rent-charge secured by the mortgage or incumbrance, at the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument, and from and against the liability in respect of any of the covenants therein contained, or under this Act implied, on the part of the transferor.

65. (1) Every covenant and power, declared to be implied in any instrument by virtue of this Act, may be negatived or modified by express declaration in the instrument.

(2) Every such implied covenant shall have the same force and effect, and be enforced in the same manner, as if it had been set out at length in the transfer or other instrument.

(3) When a transfer or other instrument in accordance with this Act is executed by more parties than one, such covenants as are by this Act to be implied in instruments of a like nature shall be construed to be several, and not to bind the parties jointly.

PART III. Dealing with Certificate of Title.

Correction of certificate.

[**66**: B. C. 1911, s. 170A, *ante* p. 577, omitting reference to "thirty days' notice."]

Cancellation of certificate of title.

67. (1) Upon the application of an owner of several parcels of land held under separate certificates of title, or under one certificate of title, and the delivery up of the duplicate or duplicates thereof, the registrar may cancel the existing certificate or certificates of title granted, as also the duplicates so delivered up, and may grant to the owner a single certificate of title for all the parcels of land, or several certificates of title each applying to one or more of the parcels, in accordance with the application.

(2) Upon the certificate or certificates of title cancelled shall be entered a memorandum setting forth the occasion of the cancellation, and referring to the certificate or certificates of title newly granted.

(3) The registrar shall issue to the applicant one or more duplicate certificates as the case requires.

68. (1) Subject to the provisions of the next following sub-section, the registrar, in the case of a partially cancelled certificate of title, shall return the duplicate to the transferor, after the memorandum partially cancelling the same has been made thereon and upon the certificate of title in the register.

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(2) Whenever required by the owner of an unsold portion of land included in a partially cancelled certificate of title, or where such a course appears to the registrar more expedient, he may grant to such owner a certificate of title for the portion of which he is the owner, upon delivery up of the partially cancelled duplicate certificate of title to be cancelled and retained.

Lost or destroyed certificate of title.

69. (1) Upon production to the registrar of satisfactory proof, by statutory declaration of the person to whom a duplicate certificate has been issued or some one having knowledge of the facts, of the accidental loss or destruction of such duplicate, the registrar may, after having entered in the register the facts so proven, issue a fresh duplicate in lieu of the one so lost or destroyed, noting upon the same why it is so issued.

(2) Unless the registrar is satisfied as to the loss or destruction of the duplicate certificate so issued, and that notice of intention to issue another duplicate certificate in lieu of such alleged lost or destroyed certificate in a newspaper or otherwise is unnecessary, no such fresh duplicate certificate shall be issued until the registrar shall for four weeks:

(*a*) publish a notice of his intention (form G) to issue such fresh certificate in the newspaper published nearest to the land described in the register, or if more newspapers than one are published in the same locality, then in one of such newspapers; and

(*b*) post up such notices in a conspicuous place in the land titles office.

Compelling delivery of certificate.

70, 71. If the registrar requires a duplicate certificate for the purpose of making a memorandum thereon, or for the purpose of wholly or partially cancelling the same, or if it appears to the satisfaction of the registrar that:

(*a*) a duplicate certificate or other instrument has been issued in error [V. 1915, s. 80, *ante* p. 414.]

72. (1) Upon the appearance of the person summoned or brought up by virtue of a warrant as aforesaid, the judge may examine him upon oath and, in case it appears right so to do, may order such person to deliver up the duplicate certificate, or other instrument as aforesaid.

(2) Upon refusal or neglect by such person to deliver up the same pursuant to the order, or to be put under oath, or to be examined, or to answer any question touching the matter after being sworn, the judge may commit such person to the nearest common jail for any period not exceeding six months, unless the duplicate certificate or other instrument is sooner delivered up, or sufficient explanation is made why the same cannot be done.

(3) In such case, or in case such person has absconded so that summons cannot be served upon him as hereinbefore directed, or in case a period of three months from the time of mailing to such person the demand referred to in section 70 has elapsed without the duplicate certificate or other instrument having been returned to the registrar,

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the judge may direct the registrar to cancel or correct or complete the certificate of title, duplicate certificate, or other instrument in his possession, or any memorandum thereon relating to the land, and to substitute and issue if necessary a duplicate certificate or other instrument, or make such memorandum as the circumstances of the case require, and the registrar shall obey such order.

Powers of judge.

[**73**: M. 1913, s. 58, omitting proviso, *ante* p. 584.]

PART IV. INSTRUMENTS THAT MAY BE REGISTERED.

Transfers of land.

74. When land for which a certificate of title has been granted is intended to be transferred, or a right of way or other easement is intended to be created or transferred, the owner shall execute a transfer (form J), which transfer may, for description of the land intended to be dealt with, refer to the certificate of title, or give such description as is necessary to identify the land, and shall contain an accurate statement of the estate, interest, or easement intended to be transferred or created.

[**75**: M. 1913, s. 88, *ante* p. 587.]

76. (1) When an easement or incorporeal right, in or over any land for which a certificate of title has been granted, is created for the purpose of being annexed to or used and enjoyed together with other land for which a certificate of title has been granted, the registrar shall make a memorandum of the instrument creating such easement or incorporeal right upon the folios of the register which constitute the existing certificates of title of the dominant and servient tenements respectively, and upon the duplicates thereof.

[(2): M. 1913, s. 96, *ante* p. 588.]

77. If a transfer purports to transfer the transferor's interest in the whole or part of the land mentioned in a certificate of title, the transferor shall deliver up the duplicate, and the registrar shall make a memorandum setting forth the particulars of the transfer upon both the certificate and the duplicate, cancelling the same either wholly or partially, according as the transfer purports to transfer the whole or part only of the interest of the transferor in the land.

78. Upon every transfer of the land mentioned in a certificate of title, a new certificate and duplicate thereof shall be granted by the registrar to the transferee on application.

Plans.

79. (1) The registrar may require the owner of any land within his registration district, desiring to transfer or otherwise deal with it under the provisions of this Act, to have it surveyed by a Saskatchewan land surveyor, and to furnish him with a plan of such survey and one copy thereof, drawn in accordance with the regulations prescribed for land titles offices by the master of titles.

(2) The plan shall be signed by the owner, and certified by the surveyor (form K), and the signature of the owner shall be witnessed

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and attested in the manner herein provided for the attestation of all instruments.

(3) If the owner neglects or refuses to comply with the requirements of this section, the registrar shall not proceed with the registration of the transfer or other instrument until such requirements are complied with.

80. (1) An owner, subdividing land for which a certificate of title has been granted into blocks or lots, shall register a plan and three copies thereof, in accordance with the above named regulations.

(2) The registrar shall endorse on the plan a certificate showing its number and date of registration, and shall deliver one copy to the department of highways for Saskatchewan, and one copy to the chief surveyor of the Saskatchewan land titles offices, retaining the plan in the land titles office, and returning one copy to the owner.

(3) The plan shall be marked "original" by the surveyor who made and executed it.

(4) The plan shall clearly illustrate and represent the survey as made on the ground in accordance with the Saskatchewan Surveys Act.

(5) Every such plan shall be certified (form K) by the surveyor who made the survey, and signed by every owner or his agent thereunto duly authorized by a registered power of attorney, and each signature shall be witnessed and attested in the manner herein provided for the attestation of instruments to be registered under this Act.

(6) No plan of subdivision of mortgaged or incumbered land shall be registered, unless approved and signed by the mortgagee or incumbrancee, whose signature shall be witnessed and attested in the manner herein provided for the attestation of instruments to be registered under the Act.

(7) No lots shall be sold, under agreement for sale or otherwise, according to a townsite or subdivision plan, until the plan has been registered in the land titles office for the registration district in which the land shown thereon is situated.

(8) Where land is surveyed and subdivided for the purpose of being sold or conveyed in lots, by reference to a plan which has not been already registered, the person making the survey and subdivision shall within three months thereafter register the plan.

(9) In the case of refusal or neglect by the person making the subdivision, for two months after demand in writing for that purpose, to register the plan in accordance with the provisions of this Act, when required by any person interested therein, or by the master of titles, so to do, he shall incur a penalty of $20 for every calendar month which thereafter elapses without the plan being registered.

(10) A person who purchases any such lot or parcel of land without knowledge of the nonregistration of the plan, or of the necessity for registration of the same, or any person claiming under him, may at his option on acquiring such knowledge rescind the contract, and recover back any money paid thereunder, with lawful interest and any taxes or other expenses incurred by him in consequence of such purchase, and he shall have a lien on the land for all such moneys as against the vendor's interest, but the vendor shall nevertheless be bound by the contract, deed or conveyance, if the purchaser does not rescind the same.

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(11) The registration in the land titles office of a plan of the subdivision of land in lots or blocks shall vest the title to all streets, lanes, parks or other reserves for public purposes, shown on such plan, in his Majesty in the right and to the use of his province of Saskatchewan; and no change or alteration in the boundaries of any street, lane, park or public reserve shall be made without the consent of the minister of highways having first been obtained.

(12) The right and title to all mines and minerals under such streets, lanes, parks or public reserves shall remain vested in the owner of such mines and minerals and his assigns.

(13) The foregoing provisions of this section shall operate retrospectively, and shall apply to all plans of subdivisions whensoever registered.

(14) No plan of subdivision of land within the corporate limits of a city or town, whether it be an original subdivision of a town plot, or a re-subdivision of lots or blocks contained in such original subdivision, shall be registered:

(*a*) unless it conforms to the regulations made by the council of such city or town with regard thereto, provided that such regulations have been approved by the minister of highways; or

(*b*) in case there are no such approved regulations, unless the director of surveys has certified on the plan that it complies in every respect with the regulations of the department of highways.

(15) No plan of subdivision of land outside the corporate limits of a city or town shall be registered, unless the director of surveys certifies in manner similar to that mentioned in clause (*b*) of the preceding sub-section.

(16) Plans shall be submitted to the chief surveyor of the land titles office within thirty days of approval by the proper municipal authority, and to the registrar for registration within thirty days of approval by the chief surveyor.

(17) On the registration of a subdivision plan, the registrar shall cancel the existing certificate of title, and issue to the owner certificates of title to the property in blocks and lots as shown on the plan.

81. (1) Railway corporations shall file with the registrar of the land registration district within which such lands are situated a plan, and one copy thereof, showing the lands required for their right of way and station grounds, or for any other railway purpose, before a certificate of title is granted therefor; and such plan and copy shall be in accordance with the regulations prescribed for land titles offices by the master of titles.

(2) The plans shall clearly show that the surveys represented thereon have been made in all respects in accordance with the Saskatchewan Surveys Act, and shall be certified by a Dominion land surveyor (form L), or by a Saskatchewan land surveyor (form K), according as the land dealt with is Dominion or patented land.

(3) When the location of the railway is through land which has been subdivided, and of which a plan has been registered under section 80 of this Act, the plan must show distinctly lines of all allotments taken in whole or in part for railway purposes, according to the registered plan.

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(4) The area taken from each quarter section, settlement lot or parcel of land, as the case may be, shall be shown on the plan.

(5) Notwithstanding anything in this section, the registrar may accept transfers of land for right of way and station grounds referring to any plan prepared prior to the first day of January 1914, and signed by a Dominion land surveyor, or prepared before or subsequently to the said first day of January 1914, and signed by a Saskatchewan land surveyor, filed in his office on or before the first day of January 1915, pursuant to the Railway Act of Canada or the Railway Act, being chapter 75 of the Revised Statutes of Saskatchewan 1909, if in his opinion the lands to be transferred are clearly and sufficiently defined, and the centre line properly tied into the land boundaries of the section or other parcel of land, and all information and measurements necessary to locate the said lands upon the ground are shown upon the said plan.

(6) The provisions of the foregoing sub-sections of this section shall apply, mutatis mutandis, to any person constructing an irrigation ditch or pipeline, water, gas or oil pipeline, or any other transmission line, pipe or conduit, for which a right of way is required.

82. (1) Any map or plan, other than a plan of subdivision into lots or blocks, attested by the signature of the superintendent-general of Indian affairs or his deputy, and certified by a Dominion land surveyor to be a true copy of a plan or survey lodged or filed in the department of Indian affairs, of lands described as "Indian lands" in the Indian Act shall be dealt with and recognized in accordance with the provisions of this Act by the registrar of the district in which the said lands are situated, when the said map or plan has been lodged or filed with him, notwithstanding that the Indian Act does not expressly authorize the said map or plan to be so lodged or filed.

(2) Any such map or plan of subdivision into lots or blocks shall comply with the provisions of section 80.

83. Any plan which has been prepared in accordance with the provisions of an Act of the parliament of Canada, or of an ordinance of the North-West Territories, or of an Act of the legislature of Saskatchewan, and which has been lodged or filed with the registrar under or in accordance with the provisions of any of said Acts or ordinances, shall be dealt with and recognized by him, in so far as it is capable of being dealt with and recognized, as if it had been prepared and filed or registered under and in accordance with the provisions of this Act.

84. Except roadway plans, the registrar shall not accept a plan under this Act for registration, or any other purpose of record, any part of which is stamped, printed, typewritten, stencilled, lithographed or engraved.

85. (1) Every plan, except roadway plans, filed or registered under this Act shall bear the approval of the chief surveyor of the land titles offices, and shall be presented for filing or registration within thirty days of the date of such approval.

(2) Upon filing or registering any plan, the registrar shall forward one copy thereof to the chief surveyor aforesaid.

86. (1) Where in any plan heretofore or hereafter filed or registered there is an omission, clerical error, or other defect, the master of

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titles may order the same to be corrected in such manner as to him may seem best, and the registrar shall thereupon:

(*a*) file the master's order, and enter upon the plan filed or registered in his office, and all copies thereof produced by him, a memorandum of such order;

(*b*) substitute the corrected plan (if any) for the plan previously filed or registered;

(*c*) perform such other acts or duties as may be required by such order.

(2) Upon such filing the corrected plan shall be deemed to be substituted for the original, and thereafter the original shall for all purposes be deemed to have been so amended or corrected from the time of its registration, and the description in any instrument of land therein included shall be construed as if it referred to the corrected plan, but such amendment or correction by the master of titles shall not affect the rights of any person existing when the amendment or correction is made.

87. Upon the application of the person who registered a plan, or of anyone deriving title through him to land included therein, and upon hearing all parties interested, the master of titles may order the cancellation in whole or in part, amendment, or alteration of the plan, upon such terms and conditions as to costs and otherwise as may seem meet; and he may order the amendment or cancellation of certificates of titles issued according to the original plan, and the issue of new certificates according to the new or amended plan.

Plans of roads.

88. (1) Whenever the plan of a surveyed road or trail is forwarded to the registrar of the proper land titles office, pursuant to the provisions of the Highways Act, the registrar shall proceed as follows:

(*a*) he shall call in the duplicate certificates of title for all patented lands affected thereby, in the manner set forth in section 70 of this Act;

(*b*) upon receipt of same or, if the registered owner of any such lands refuses or neglects to return the said duplicate within thirty days after the demand therefor has been mailed to him by the registrar, then at the expiration of such thirty days, the registrar shall file and register the plan, and shall cancel the area required for the road or trail as shown thereon from the certificates of title, and from the duplicates that may have been or may thereafter be returned to him;

(*c*) he shall grant a certificate of title for the road or trail, free from all incumbrances, liens, estates or interests whatsoever, to his Majesty in the right of the province, and shall issue to his Majesty a duplicate of such certificate, and forward the same to the minister of highways.

(2) The right and title to all mines and minerals which may be found to exist under such land shall continue to be vested in the original owners of such mines and minerals and their assigns.

(3) The registration of the plan of survey of land required for a ditch, reservoir or other water right, when the applicant for such

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right is the minister of highways, shall vest the lands shown on such plan in his Majesty in the right of Saskatchewan, and such plan shall be dealt with in all respects by the registrar in the same manner as is provided in the first sub-section of this section, with respect to the plan of a surveyed road or trail.

89. If a certificate of title has not been granted for any land affected by a road or trail as shown upon the plan forwarded to the registrar, the registrar shall issue to the Crown in the right of the province a certificate of title for the land affected by the road or trail, according to such plan.

90. (1) A notification to the registrar from the minister of highways that land described in such notification, which is a part of a road allowance or surveyed road or trail vested in the Crown in the right of the province, has been closed, shall operate as a transfer from the Crown to the person named as transferee in such notification, or in a transfer attached thereto, and shall be accepted by the registrar, and be dealt with by him in all respects, as if such notification were letters patent in favour of such person.

(2) The notification shall state the nature of the grant, and shall specify any mines, minerals, easements or rights which are excepted therefrom.

(3) A notification to the registrar from the minister of highways that the land shown on any plan or road, drain or water right, for which a certificate of title in the name of his Majesty in the right of the province has not been issued, has been abandoned, shall operate as a transfer from the Crown to the registered owner of the land through which the road, drain, or water right to be abandoned passes, and shall be accepted as such by the registrar, and any memorandum which may have been made upon the original certificate of title to the land upon the filing of the plan shall be cancelled.

91. A copy of any plan made under the provisions of the North-West Territories Act, duly certified by the surveyor-general of the department of the interior, and by the minister of highways for Saskatchewan, shall be accepted and dealt with by the registrar under the provisions of sections 88 to 90 inclusive.

Leases.

92. (1) When land for which a certificate of title has been granted is intended to be leased or demised for a life or lives, or for a term of more than three years, the owner shall execute a lease (form M), and such instrument shall for description of the land refer to the certificate of title, or give such other description as will identify it.

(2) A lessee for a life or lives, or for a term, in land for which the grant from the Crown has been registered, may apply to have his title registered.

(3) Upon registration of the leasehold title, the registrar shall retain possession of the duplicate certificate of title on behalf of all persons interested in the land covered thereby, and shall if desired furnish, either to the lessor or lessee or to both, a certificate of the registration of the lease (form N).

(4) A right for lessee to purchase the land therein described may be stipulated in the instrument.

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(5) No lease of mortgaged or incumbered land shall be valid as against the mortgagee or incumbrancee, unless he has consented in writing to the lease prior to registration, or subsequently adopts the same.

93. In every lease, unless a contrary intention appears therein, there shall be implied covenants by the lessee:

(*a*) that he will pay the rent thereby reserved at the times therein mentioned;

(*b*) that he will at all times during the continuance of the lease keep, and at the termination thereof yield up, the demised land and view the state of repair, and may serve damage to buildings from fire, storm and tempest, or other casualty, and reasonable wear and tear excepted.

94. In every lease, unless a different intention appears therein, there shall also be implied powers in the lessor:

(*a*) that he may by himself or his agents enter upon the demised land and view the state of repair, and may serve upon the lessee, or leave at his last or usual place of abode or upon the demised land, a notice in writing of any defect, requiring him within a reasonable time to be therein mentioned to repair the same in so far as the tenant is bound so to do.

(*b*) that in case the rent reserved, or any part thereof, is in arrear for the space of two calendar months, although no formal demand thereof shall have been made, or in case default is made in the performance of any covenant on the part of the lessee, whether express or implied, and such default is continued for the space of two calendar months, or in case the repairs required by such notice as aforesaid are not completed within the time therein specified, it shall be lawful for the lessor, at any time thereafter, into and upon the demised premises or any part thereof in the name of the whole to re-enter, and the same to have again, repossess and enjoy, as of his former estate;

(*c*) that if the lessee or any other person shall be convicted of keeping a disorderly house, within the meaning of the Criminal Code, on the demised premises or any part thereof, it shall be lawful for the lessor, at any time thereafter, into and upon the demised premises to re-enter, and the same to have again, repossess and enjoy, as of his former estate.

95. (1) Upon proof to his satisfaction of lawful re-entry and recovery of possession of leased land by a lessor or his transferee, by a legal proceeding, the registrar shall make a memorandum of the same upon the certificate of title, and upon the duplicate thereof when presented to him for the purpose, and the estate of the lessee in such land shall thereupon determine, but without releasing the lessee from his liability in respect of the breach of any covenant theretofore committed.

(2) The registrar shall cancel the lease, if delivered up to him for that purpose.

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96. (1) Whenever in a lease made under this Act any of the forms of words in column one of form O, and distinguished by any number therein, is used, the lease shall be taken to have the same effect, and be construed, as if there had been inserted therein the form of words contained in column two of the said form, and distinguished by the same number: provided that it shall not be necessary in any such lease to insert any such number.

(2) Every such form shall be deemed a covenant binding upon the covenantor, his executors, administrators and assigns, in favour of the covenantee and his executors, administrators and assigns.

(3) There may be introduced into or annexed to any of the forms in the first column any expressed exceptions from the same, or expressed qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in corresponding forms in the second column.

97. (1) When a lease or demise which has been registered is intended to be surrendered, and the surrender is effected otherwise than by the operation of law, the registrar shall, upon the production of a surrender (form P), make a memorandum thereof upon the certificate of title in the register and upon the duplicate: provided that no lease subject to mortgage or incumbrance shall be surrendered without the consent of the mortgagee or incumbrancee.

(2) When the memorandum has been so made, the estate or interest of the lessee shall vest in the lessor, or other person entitled to the land on expiry or determination of the lease.

Mortgages and incumbrances.

98. (1) When land for which a certificate of title has been granted is intended to be charged or made security in favour of a mortgagee, the mortgagor shall execute a mortgage (form Q, or to the like effect).

(2) When such land is intended to be charged with or made security for the payment of an annuity, rent-charge, or sum of money other than a debt or loan in favour of any incumbrancee, the incumbrancer shall execute an incumbrance (form R, or to the like effect).

(3) Every such instrument shall contain an accurate statement of the estate or interest intended to be mortgaged or incumbered, and shall for description of the land refer to the certificate of title under which the estate or interest is held, or give such other description as will identify it.

99. (1) A mortgage or any other instrument affecting land by way of charge, lien, or incumbrance given to secure the payment of the whole or part of the purchase price of chattels, and executed before the expiration of six months after the delivery to the purchaser of the said chattels or any of them, shall be absolutely null and void to all intents and purposes whatsoever, anything contained in any Act to the contrary notwithstanding.

(2) The foregoing sub-section shall not apply to instruments given to secure payment of the whole or part of the purchase price of goods, wares, or merchandise or fixtures sold either to a merchant in the course of his business, or to enable any person to enter into and carry on business as a retail merchant.

(3) [Sub-s. 1 does not apply when land has been "sold with chattels upon an entire consideration."]

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(4) If by fraud, inadvertence or otherwise, any such mortgage or other instrument, or a caveat founded thereon, is registered, such registration shall be absolutely null and void to all intents and purposes whatsoever.

100. (1) If the holder of a mortgage or incumbrance, created by any person rightfully in possession of land prior to the issue of the grant from the Crown, or prior to the issue of the transfer from the Hudson's Bay Company, or from any company entitled to a grant of such lands from the Crown, or to which letters patent from the Crown have already issued, produces to and leaves with the registrar the mortgage or incumbrance accompanied by an affidavit by the mortgagor or incumbrancer (form E), and also, in the case of lands mortgaged or incumbered prior to the issue of transfer from the Hudson's Bay Company or other company as aforesaid a certificate from the land commissioner, or other proper officer of the company, that the purchase price of such mortgaged or incumbered lands has been paid, and that the mortgagor or incumbrancer is entitled to a transfer in fee simple therefor from such company, the registrar shall file such mortgage or incumbrance.

(2) The registrar shall, on registering the grant or transfer of lands so mortgaged or incumbered enter in the register, and endorse upon the duplicate certificate of title when one is issued, a memorandum of the mortgage or incumbrance.

(3) When so entered, the mortgage or incumbrance shall be as valid as if made subsequent to the issue of the grant, or to the issue of the transfer from the Hudson's Bay Company, or from any company entitled to a grant of such lands from the Crown, or to which letters patent from the Crown for such lands may have issued, as the case may be.

101. When a mortgage or incumbrance is registered under the provisions of this Act, the registrar shall retain possession of the duplicate certificate of title on behalf of all persons interested in the land covered by such mortgage or incumbrance; but he shall, if desired, furnish to the owner of such mortgage or incumbrance a certificate of charge, which may be in form S.

102. A mortgage or incumbrance under this Act shall have effect as security, but shall not operate as a transfer of the land thereby charged.

103. (1) An order or judgment for alimony may be filed in any land titles office in Saskatchewan, and the filing shall, so long as the order or judgment remains in force, bind the estate and interest of every description which the defendant has in any lands in the land registration district where the filing is made, and operate thereon, in the same manner, and with the same effect, as the registration of a charge by the defendant of a life annuity on his lands.

(2) From and after the receipt by the registrar of such order or judgment, no certificate of title shall be granted, and no transfer, mortgage, incumbrance, lease, or other instrument executed by the defendant shall be effectual, except subject to the rights of the person entitled to alimony, while such order or judgment is legally in force.

(3) The registrar, on granting a certificate of title, and on registering any transfer, mortgage, or other instrument executed by the defendant affecting such land, shall by memorandum upon the certificate of title in the register, and on the duplicate, state that such certificate, transfer, mortgage, or other instrument is subject to such rights.

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(4) The charge created by such order or judgment may be discharged by the filing of a release or discharge in writing, executed by the person entitled to the alimony, or of a judgment or order of the court setting aside the order or judgment, or by a certificate of a registrar or clerk of the court under the seal of the court that the order or judgment has been discharged or set aside.

104. In every mortgage there shall be implied, against the mortgagor remaining in possession, a covenant that he will repair and keep in repair all buildings or other improvements erected and made upon the land, and that the mortgagee may, at all convenient times until the mortgage is redeemed, enter into or upon the land, with or without surveyors, to view the state of repair of the buildings or improvements.

105. (1) When, in a mortgage made under this Act, any of the forms of words in column one of form T, and distinguished by any number therein, is used, such mortgage shall have the same effect, and be construed, as if there had been inserted therein the form of words contained in column two of the said form, and distinguished by the same number; but it shall not be necessary in any such mortgage to insert such number.

(2) Every such form shall be deemed a covenant by the mortgagor with the mortgagee and his legal representatives or transferees, binding the former and his executors, administrators and transferees; and there may be introduced into or annexed to any of the forms in the first column any expressed exceptions from the same, or expressed qualifications thereof respectively, and the like exception or qualifications shall be taken to be made from or in the corresponding forms in the second column.

106. A mortgagee or incumbrancee of lands may from time to time, either upon the written request of the owner, or, in case default has been made, without such request, insure against loss by hail the crops growing on the land subject to the mortgage or incumbrance, and the cost of such insurance shall be added to the principal sum owing under and by virtue of the mortgage or incumbrance, and shall be repayable with interest on the then next ensuing date set for payment of any instalment of principal or interest.

Remedies of mortgagees and incumbrancees.

107. Proceedings to enforce payment of moneys secured by mortgage or incumbrance, or to enforce the observance of the covenants, agreements, stipulations, or conditions contained in a mortgage or incumbrance, or for sale of the lands mortgaged or incumbered, or to foreclose any estate, interest, or claim in or upon the lands mortgaged or incumbered, or to redeem or discharge land from a mortgage, may be had and taken in the Supreme Court of Saskatchewan.

108. (1) In every case where:

(*a*) a registered mortgage or incumbrance contains a covenant authorizing the mortgagee or incumbrancee, upon default in payment of the principal, interest, annuity or rent-charge, or any part thereof, thereby secured, or in the observance of any covenant expressed or by this Act declared to be implied therein, to enter into possession

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of the lands, and receive and take the rents, issues and profits thereof;

(*b*) such default has been made, and has continued for the space of one calendar month, or for such longer time as may be expressly limited for the purpose;

(*c*) the mortgagee or incumbrancee has registered notice of his intention so to do, and has served copies of such notice upon the mortgagor or incumbrancer, his executors, administrators or assigns, and upon every other person appearing by the records of the land titles office at the date of registration of the notice to have any mortgage, incumbrance or lien upon, or estate, right, or interest in or to the lands subsequent to such first named mortgage or incumbrance:

the mortgagee or incumbrancee may, without the further consent or concurrence of any person interested, enter into possession of the lands, and receive and take the rents, issues and profits thereof, and whether in or out of possession, may lease the same or any part thereof as he may see fit.

(2) The term covered by a lease or leases made under the preceding section[1] shall not extend in all beyond a period of five years.

(3) The mortgagee or incumbrancee may by such notice require the mortgagor or owner, and such other interested persons as aforesaid, to pay within a time to be specified in the notice the money then due or owing on the mortgage or incumbrance, or to observe the covenants therein expressed or implied, as the case may be, and may notify them that all remedies competent will be enforced unless such default be remedied.

109. Upon such default in payment, or in the observance of any covenant, continuing for the further space of two calendar months from the date of service of such notice, the mortgagee or incumbrancee may, pursuant to any power of sale contained in the mortgage or incumbrance, sell the land or any part thereof, and all the estate and interest therein of the mortgagor or incumbrancer and of the other interested parties referred to in the last preceding section, at such time and in such manner as the registrar may direct, and either altogether or in lots, by public or private contract, or by such modes of sale and subject to such terms and conditions as to expenses or otherwise as the registrar may think fit.

110. (1) Such mortgagee or incumbrancee may make and execute all such instruments as shall be necessary for the sale and enjoyment of the premises; and such instruments shall be as valid and effectual as if the mortgagor or incumbrancer and other persons aforesaid had made, done or executed the same.

(2) The receipt in writing of the mortgagee or incumbrancee shall be a sufficient discharge to the purchaser of such land, estate or interest, or of any portion thereof, for so much of his purchase money as may thereby be expressed to be received, and no such person shall be answerable for the loss, misapplication or nonapplication, or be obliged to see to the application of the purchase money by him paid, nor shall he be obliged to enquire as to the fact of any default or notice having

[1] This is a misprint for "sub-section."

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been made or given as aforesaid, or how the purchase money to arise from the sale of any such land, estate, or interest shall be applied.

110A. Where land is sold in an action or proceeding upon a mortgage or incumbrance, the purchase money [M. 1913, s. 120, *ante* p. 592.]

111. Upon the registration of any instrument executed by a mortgagee or incumbrancee for the purpose of such sale as aforesaid, the estate or interest of the owner of the land mortgaged or incumbered shall pass to and vest in the purchaser, freed and discharged from all liability on account of such mortgage, and of any mortgage, lien, charge, or incumbrance created by any instrument registered subsequent thereto, and the purchaser shall be entitled to receive a certificate of title for the same.

112. (1) When default has been made in payment of the principal or interest secured by a mortgage or incumbrance, and such default has continued for six months after the time fixed for payment, the mortgagee or incumbrancee, or his transferee may make an application in writing to the registrar for an order for foreclosure.

(2) The application shall state that such default has been made, and has continued for the period aforesaid, that the land mortgaged or incumbered has been offered for sale at public auction under the provisions of this Act, that the amount of the highest bid at the sale was not sufficient to satisfy the moneys secured by the mortgage or incumbrance, together with the expense occasioned by the sale, and that the notice mentioned in section 108, or subsequent notice served upon the same persons, declared the intention of the mortgagee or incumbrancee to apply for foreclosure in case such sale should prove abortive.

(3) The application shall be accompanied by such proof of the matters stated by the applicant, and such other evidence, as the registrar may require.

113. Unless the registrar shall see fit to order otherwise, the notice, whether of intention to enter into possession of the lands and receive and take the rents, issues and profits thereof, or to sell, or to apply for a foreclosure order, shall be served personally on the owner, mortgagor or incumbrancer, and other persons interested as aforesaid; but in case any of such persons cannot after due diligence be found, the registrar may direct service of the notice by leaving it on the mortgaged lands, or by mailing it in a sealed envelope by registered post, directed to him at his last known address, or in such other manner as the registrar may deem expedient.

114. (1) Upon receipt of the application mentioned in section 112, the registrar may, if he considers it proper, cause notice to be published once in each of three consecutive weeks in one or more specified newspapers, and in two consecutive issues of the Saskatchewan Gazette, offering such land for private sale.

(2) The registrar shall appoint a time not less than one month from the date of the first of such advertisements, or in case there is no advertisement not less than one month from the date of such application, when he may issue to the applicant an order of foreclosure, unless in the interval a sufficient amount of money has been obtained from the sale, or paid by or on behalf of the owner, mortgagor or incumbrancer, or other person as aforesaid, to satisfy the

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principal and interest and other moneys secured, and all expenses occasioned by such sale and proceedings.

(3 Every such order of foreclosure under the hand of the registrar shall, when entered in the register, have the effect of vesting in the mortgagee or incumbrancee, or his transferee, the land mentioned therein, free from all right and equity of redemption on the part of the owner, mortgagor or incumbrancer, or any person claiming through or under him subsequently to the mortgage or incumbrance; and such mortgagee, incumbrancee, or transferee shall, upon such entry being made, be deemed a transferee of the land and become the owner thereof, and be entitled to receive a certificate of title for the same.

115. In case default is made in the payment of money due under a mortgage, or in the observance of a covenant contained therein, and under the terms of the mortgage by reason of such default the payment of other portions of the principal money is accelerated, and such portions become presently due and payable, the mortgagor may, notwithstanding any provision to the contrary and at any time before sale, or before the grant of a final order of foreclosure, perform such covenant or pay such arrears as are in default, with costs to be taxed by the registrar, and the mortgagor shall thereupon be relieved from immediate payment of so much of the money secured by the mortgage as may not have become payable by lapse of time.

(2) The provisions of this section shall apply to all mortgages whenever made.

116. A mortgagor may agree in writing to become the tenant of the mortgagee, and in case of such agreement heretofore or hereafter made, the relationship of landlord and tenant shall be held to have been validly constituted between the parties for all purposes, and as against all persons whomosever: provided that nothing herein contained shall affect the rights of any parties in any action or other proceeding now pending.

Transfers and discharges, mortgages, incumbrances and leases.

117. (1) When a mortgagor or incumbrancer is entitled to redeem, he may require the mortgagee or incumbrancee, instead of giving a discharge, to transfer the mortgage or incumbrance to a third party named by him (form U).

(2) When any person other than the mortgagor or incumbrancer is interested in the land covered by a mortgage or incumbrance, and is entitled to redeem, he may require the mortgagee or incumbrancee, instead of giving a discharge, to transfer the mortgage or incumbrance to him.

118. (1) Upon production to the registrar of:

(*a*) a memorandum of discharge, duly executed and attested, discharging the whole or part of a mortgage or incumbrance, or the whole or a part of the land therein comprised; or

(*b*) a certificate signed by a judge that payment of the whole or a part of the moneys due under a mortgage or incumbrance has been proved to his satisfaction;

the registrar shall make an entry on the register that the mortgage or incumbrance is discharged, wholly or in part, or that part of the land is discharged, as the case may be.

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(2) Upon such entry being made the land, or the estate or interest in the land, or the portion of the land mentioned or referred to therein, shall cease to be liable for such principal sum or annuity, or for the part thereof mentioned in the entry as discharged, as the case may be.

119. (1) Upon:

(*a*) proof of the death of the annuitant, or of the happening of the event upon which, by the terms of an incumbrance, the annuity or money thereby secured ceases to be payable, and that all arrears of the annuity and interest or other money have been satisfied; or

(*b*) production of a judge's order declaring or directing the discharge of the incumbrance;

the registrar shall make a memorandum on the certificate of title and duplicate that the incumbrance is discharged.

(2) Upon such memorandum being made, the land shall cease to be subject or liable for such annuity or sum of money.

120. If a mortgagor becomes entitled to pay off the mortgage money, and the registered mortgagee is absent from Saskatchewan, and there is no person authorized by registered power of attorney to give a receipt to the mortgagor for the mortgage money, or if the registered mortgagee is deceased and has no legal representative, a judge may, after the date appointed for redemption, on proof of the facts and of the amount due for principal and interest, direct the payment of the mortgage money with all arrears of interest to the provincial treasurer, who shall hold the same for the mortgagee, or other person entitled thereto.

121. (1) The registrar shall, upon presentation of the judge's order, and of the receipt of the provincial treasurer for the amount of the said mortgage money or interest, make a memorandum upon the certificate of title in the register, describing such mortgage and stating the day, hour, and minute on which the memorandum is made.

(2) Such memorandum shall be a valid discharge of the mortgage.

(3) The registrar shall, when such order and receipt are presented to him, send a notice of the fact to the mortgagee, by letter addressed by mail to his last known place of abode.

(4) The registrar shall endorse on the duplicate certificate of title, and also on the mortgage, the several particulars to be endorsed upon each of such instruments respectively.

(5) After payment as aforesaid of any mortgage money and interest, the interest upon the mortgage shall cease to run or accrue, and the mortgagee entitled thereto shall not recover any further sum in respect of such mortgage than the amount so paid.

122. (1) Mortgages, incumbrances, and leases of land for which a certificate of title has been granted may be transferred, by a transfer executed in form U.

(2) The transfer shall be registered in the same manner as mortgages, incumbrances and leases are registered.

(3) Transfers shall have priority according to the time of registration.

(4) In case of a charge by a mortgagee of his interest in a mortgage, the person in whose favour the charge is created shall be deemed the transferee of such interest, and shall have all rights and powers as such, subject to the provisos and conditions expressed in the instrument creating the charge, or implied therein by virtue thereof.

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123. (1) A mortgagee may transfer a part of the sum secured by the mortgage, by a transfer executed in form V, and the part so transferred shall continue to be secured by the mortgage, and may by the transfer be given priority over the remaining part, or be deferred, or continue to rank equally with such part, under the security of the original mortgage.

(2) The registrar shall enter on the certificate of title and duplicate a memorandum of the amount of the mortgage money so transferred, the name of the transferee, and how such sum is to rank, and shall notify the mortgagor of the facts.

124. (1) Upon the registration of a transfer of a mortgage, incumbrance or lease, the interest of the transferor as set forth in such instrument, with all rights, powers, and privileges thereto appertaining shall pass to the transferee; and the transferee shall thereupon become subject to the same liabilities as if named in the original instrument as mortgagee, incumbrancee or lessee, to the extent of the interest transferred.

(2) By virtue of every such transfer the right to sue upon the mortgage or other instrument, and to recover the amount transferred or damages, and all the interest of the transferor in such amount or damages, shall vest in the transferee.

(3) Nothing herein contained shall prevent the court from giving effect to any trusts affecting such amount or damages, in case the transferee holds the same as trustee for another person.

Powers of attorney.

125. (1) Any person may authorize and appoint one or more persons to act for him or on his behalf, with respect to the transfer or other dealing with land, or with any lease, mortgage, or incumbrance of land of which he may at the time be, or may subsequently become, the owner in accordance with the provisions of this Act, by executing a power of attorney in any form heretofore in use for the purpose, in which the land or instrument is not specifically mentioned and described but is mentioned and referred to in general terms, any of which forms of power of attorney the registrar shall file or register, as the circumstances of the case may require.

(2) If the land referred to in a power of attorney is specifically described, form W or a form of the like effect shall be used.

(3) Upon registration of such specific power of attorney, the registrar shall make a memorandum upon the certificate of title and duplicate of the particulars therein contained, and of the time of its registration.

(4) Where the power given is to deal with a specified and registered lease, mortgage or incumbrance, form X or a form to the like effect shall be used.

(5) Until such power of attorney, in which the land or instrument referred to is specifically described, is revoked by a revocation (form Y), the right of the owner to transfer or to otherwise deal with the land or instrument shall be suspended.

(6) The execution or registration of a general power of attorney shall not in any way affect the right of the owner to transfer or otherwise deal with his land, or with any lease, mortgage or incumbrance.

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126. (1) The registrar is hereby empowered to recognize for the purpose for which it was executed, in so far as it concerns any land in his district belonging to the person who executed it, any power of attorney which is in the general form referred to in the last preceding section, and which has heretofore been or shall hereafter be deposited, filed or registered in his office.

(2) Where an original power of attorney, in any form mentioned in the last preceding section, has heretofore been or shall hereafter be deposited, filed, or registered in a land titles office, a copy thereof, certified as such by the registrar in whose office it is of record, may be accepted by any other registrar in lieu of the original and be recognized by him for the purpose for which the original power of attorney was executed, in so far as it affects any land in the district of the last mentioned registrar belonging to the person who executed it.

(3) The registrar may accept and register, in lieu of the original, a document purporting to be a copy of a document of record in any registry or land titles office of any province or territory of Canada, or of the United Kingdom of Great Britain and Ireland, or of any British possession, or of any of the United States of America, certified a true copy under the hand and seal of the registrar; or purporting to be a copy duly certified by a notary or prothonotary of the province of Quebec as a true copy of a document filed or enregistered with him, and in his possession as such notary or prothonotary.

127. (1) Any such power of attorney may be revoked by a revocation (form Y).

(2) After registration of a revocation of a power of attorney, the registrar shall not register any transfer or other instrument made by virtue of the provisions of such power, unless executed prior to such revocation.

Caveats.

128. Any person, claiming to be interested in land for which a certificate of title has been granted, may file a caveat with the registrar, to the effect that no registration of any transfer or other instrument affecting the said land shall be made, and no certificate of title to such land granted, until such caveat has been withdrawn, or has lapsed as hereinafter provided, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat.

129. No caveat may be registered which has annexed thereto or endorsed thereon, or which refers to or is founded upon, a writing or any part thereof within the meaning of the Act respecting Lien Notes and Conditional Sales of Goods, or any written order, contract, or agreement for the purchase or delivery of chattels other than a contract for the sale of land with chattels upon an entire consideration.

130. (1) Every such writing, and every such written order, contract, or agreement for the purchase or delivery of chattels shall be, in so far as it affects or purports to affect land in Saskatchewan, absolutely null and void to all intents and purposes whatsoever, anything contained in any Act to the contrary notwithstanding.

(2) If by inadvertence, accident, or the nonperformance of duty on the part of the registrar, or otherwise howsoever, a caveat is registered contrary to the provisions of the preceding section, such reg-

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istration shall nevertheless be absolutely null and void to all intents and purposes whatsoever.

131. The registrar may enter a caveat:

(*a*) on behalf of his Majesty, or of any person under disability, to prohibit the transfer or dealing with any land belonging, or supposed to belong, to the Crown or such person; or

(*b*) to prohibit the dealing with land in respect of which it shall appear to him that an error has been made in the certificate of title, or any other instrument, or for the prevention of threatened or apprehended fraud or improper dealing.

132. A caveat shall be in form Z, shall be verified by the oath of the caveator or his agent, and shall contain an address within Saskatchewan at which notices may be served.

133. (1) Upon the receipt of a caveat the registrar shall enter the same in the day book, and make a memorandum thereof upon the certificate of title of the land affected thereby, and shall forthwith send a notice of the caveat through the post office or otherwise, to the person against whose title it has been registered.

(2) A caveat to prevent the bringing of land under this Act except subject to the claim of the caveator, as stated in such caveat, may be filed before a certificate of title is granted, and in such case the registrar shall, on receipt of the caveat, enter the same in the day book.

134. While a caveat remains in force, the registrar shall not enter in the register any memorandum of a transfer or other instrument purporting to transfer, incumber, or otherwise deal with or affect the land in respect to which such caveat is lodged, except subject to the claim of the caveator.

135. The owner, or other person claiming an interest in such land, may by summons call upon the caveator to attend before a judge, to show cause why the caveat should not be withdrawn; and the said judge may, upon proof that such last mentioned person has been summoned and upon such evidence as he may require, make such order in the premises as to him seems meet.

136. (1) Subject to the provisions of the preceding section, such caveat shall continue in force until it is removed in the manner hereinafter set forth.

(2) Except in the case of caveats under an Act respecting Homesteads, being chapter 29 of the statutes of 1915, and caveats filed by the registrar, the owner or other person claiming an interest in the land may require the registrar, by notice in writing (form AA), to notify the caveator, at his address for service as set forth in the caveat, that such caveat shall lapse at the expiration of thirty days from the mailing of the notice by the registrar, unless in the meantime the caveator shall file with the registrar a judge's order providing for the caveat continuing beyond the said thirty days. The notice from the registrar shall be given by registered letter.

(3) If such order is not filed with the registrar within the time limited by the notice, the caveat shall lapse. If such order is filed within the time so limited, the caveat shall lapse at the expiration of the extended period named in the order, unless a further order continuing the caveat is in the meantime filed with the registrar.

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(4) In case an interest in the land other than the interest of the caveator is protected by such caveat, the registrar may refuse to notify the caveator as required by this section, and in such case the removal of the caveat shall be subject only to the provisions of section 135.

137. The caveator or his personal representatives may, by notice in writing to the registrar, withdraw his caveat at any time; but, notwithstanding such withdrawal, the court or judge may order payment by the caveator of the costs of the caveatee incurred prior to such withdrawal.

138. (1) A memorandum shall be made by the registrar upon the certificate of title and upon the duplicate certificate of the withdrawal, lapse, or removal of any caveat, or of any order made by the court or a judge in connexion therewith.

(2) After such withdrawal, lapse or removal, it shall not be lawful for the same person, or for any one on his behalf, to register a further caveat in relation to the same matter, unless by leave of a judge.

139. (1) Any person registering or continuing a caveat wrongfully, and without reasonable cause, shall make compensation to any person who has sustained damage thereby.

(2) Such compensation with costs may be recovered by proceedings at law, if the caveator has withdrawn his caveat and no proceedings have been taken by the caveatee as herein provided.

(3) If proceedings have been taken by the caveatee, the compensation and costs shall be determined by the court or judge acting in the same proceedings.

PART V. Involuntary Transfer of Title.

Transmission.

140. When the owner of land for which a certificate has been granted dies, such land shall, subject to the provisions of this Act, vest in his personal representative.

141. (1) When land, or a mortgage, incumbrance, or lease affecting land for which a certificate of title has been granted is to be transmitted in consequence of the death of the owner, the person claiming transmission shall:

(*a*) apply in writing to be registered as owner;

(*b*) produce to the registrar the probate of the will of the deceased owner, or letters of administration to his estate, or an order of court authorizing him to administer the same, or a duly certified copy of such probate, letters of administration or order, as the case may be; and

(*c*) deposit with the registrar a sworn copy thereof;

and the registrar shall thereupon make a memorandum upon the certificate of title and duplicate of the date of the will and of the probate, or of the letters of administration, or order of court, as aforesaid, the date, hour, and minute of the production of the same to him, and of such other particulars as he deems necessary.

(2) For the purposes of this Act, the production of the probate of a will or letters of administration granted by the proper court of any province or territory of Canada, or of the United Kingdom of Great Britain and Ireland, or of any British possession, or of any of the states of the United States of America, or confirmation or testa-

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ment dative granted by the proper court in Scotland, or an exemplification or duly certified copy thereof, resealed under the direction of a judge of a surrogate court, and the deposit with the registrar of a sworn copy thereof, or the deposit with the registrar of a document duly certified by a notary or a prothonotary of the Province of Quebec as a true copy of a will filed or enregistered with him and in his custody, shall be sufficient.

142. (1) Upon such memorandum being made, the executor or administrator, as the case may be, shall be deemed to be owner of the land, mortgage, incumbrance, or lease, as the case may be.

(2) The registrar shall note the fact of the registration by a memorandum under his hand on the probate of the will, letters of administration, order or other instrument.

143. The title of the executor or administrator shall relate back, and take effect as from the date of the death of the deceased owner.

144. When land is transmitted, the duplicate certificate of title issued to the deceased owner shall be delivered up to be cancelled, or be proved to have been lost or destroyed, and the registrar shall grant to the executor or administrator as such a new certificate.

145. A discharge or transfer of mortgage, executed by the executor or administrator of the deceased owner, may be registered without formal transmission, on production of the original probate of the will or letters of administration, or of a copy thereof duly certified by the proper officer of the court granting such probate or administration, and deposit with the registrar of a sworn copy thereof, and on filing a certificate from the attorney-general that all succession duties payable by the estate have been paid or secured.

146. (1) For the purpose of registered dealing, the person to whom land of a deceased owner has been transmitted shall, subject to the next following sub-section, be considered the absolute owner thereof, but he shall nevertheless hold the land upon the trusts and subject to any equitable claims with which it was affected before transmission.

(2) The registrar shall not register any transfer, mortgage, or other instrument executed by the executor or administrator, except an application for transmission, or a caveat, or discharge of mortgage, unless:

(*a*) a certificate of the official guardian made subsequent to the date of grant of letters probate or administration, or of resealing thereof, that he has satisfied himself that there are no infants interested in the estate of the deceased owner, has been filed with the registrar; or

(*b*) the instrument to be registered is accompanied by the consent of the official guardian to the proposed dealing; or

(*c*) the instrument to be registered is accompanied by an order of a judge of a court of competent jurisdiction, authorizing the proposed dealing.

(3) [General consent may be filed by official guardian.]

147. (1) Upon an assignment under the provisions of the Assignments Act being made for the benefit of his creditors by the owner of land for which a certificate of title has been granted, or by the owner of a mortgage or incumbrance, the assignee may file the assignment, and may at any time thereafter apply to be registered as owner of the land, mortgage or incumbrance, and the registrar may, pursuant to such application, transmit the land, mortgage, or incum-

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brance to such assignee, who shall thereupon become the owner thereof.

(2) From and after the receipt by the registrar of such assignment, he shall not permit any dealings with such land, mortgage, or incumbrance by the original owner, nor shall he register any transfer, mortgage, lease or other instrument, made or executed by him affecting the same or any part thereof.

148. In case the assignor, within thirty days after the filing of the assignment, files with the registrar a claim in writing, signed in the presence of an attesting witness, that any of his land, describing it, is exempt from seizure under execution or other legal process, and such claim is accompanied either by a writing signed by the assignee satisfactory in form to the registrar, stating that the assignee agrees that the lands mentioned are exempt as claimed, or by the order of a judge declaring such lands so exempt, the provisions of the preceding section shall not apply to such lands, but the registrar shall permit the claimant to deal with them as if the assignment had not been made.

Executions.

149. (1) The sheriff or other duly qualified officer, after the delivery to him of an execution or other writ then in force affecting land shall, if a copy of such writ has not already been delivered or transmitted to the registrar, and on payment to him by the execution creditor named therein of fifty cents together with the amount of the registrar's fee, forthwith deliver or transmit by registered letter to the registrar a copy of the writ, and of all endorsements thereon, certified under his hand and seal of office (if any) together with such registration fee.

(2) Such writ shall, from and only from the receipt of a certified copy thereof by the registrar for the land registration district in which the land affected thereby is situated, bind and form a lien and charge on all the lands of which the debtor may be or become registered owner situate within the judicial district the sheriff of which transmits such copy, including lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution, but subject nevertheless to such equities, charges, or incumbrances as exist against the execution debtor in such land at the time of such receipt: provided that nothing herein contained shall be taken to authorize the sheriff to sell any lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution.

(3) From and after the receipt by the registrar of such copy, no certificate of title shall be granted, and no transfer, mortgage, incumbrance, lease, or other instrument executed by the execution debtor of such land shall be effectual, except subject to the rights of the execution creditor under the writ, while the same is legally in force.

(4) The registrar, on granting a certificate of title and on registering any transfer, mortgage, or other instrument executed by the execution debtor affecting such land, shall by memorandum upon the certificate of title in the register, and on the duplicate, state that such certificate, transfer, mortgage, or other instrument is subject to such rights.

(5) Every writ, a copy of which is received by the registrar shall, at the expiration of two years from the date of such receipt, cease to bind or affect the land of the execution debtor in his district unless, before the expiration of such period of two years, a renewal of such

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writ is filed with the registrar, in the same manner as the original is required to be filed with him.

(6) In case a renewal writ of execution is received by the registrar, after the expiration of two years from the date of the receipt of the copy of the original writ, such renewal shall nevertheless bind the land covered thereby from the time of its receipt, in the same manner as if it were the certified copy of an original writ.

150. (1) Upon the satisfaction or withdrawal from his hands of a writ, the sheriff or other duly qualified officer shall forthwith transmit to the registrar a certificate under his official seal (if any) to the effect that such writ has been satisfied or withdrawn.

(2) Upon the expiration of a writ of execution, or upon the production and delivery to the registrar of such a certificate, or of a judge's order showing the satisfaction or withdrawal of the writ as against the whole or any portion of the land so bound, the registrar shall make a memorandum upon the certificate of title of such expiration, or to the effect so certified or shown, if a certificate of title has been issued for such land, and whether a certificate of title has been issued or not, upon or opposite to the entry of the writ in the book to be kept under the provisions of section 29 of this Act.

(3) Thenceforth such land or portion of land shall be deemed to be absolutely released and discharged from the writ.

Sheriff's sale.

151. (1) No sale by a sheriff or other officer, under process of law, of land for which a certificate of title has been granted shall be of any effect, until the same has been confirmed by the court or a judge.

(2) When any such land is sold under process of law, the registrar, upon the production to him of the transfer of same (form BB) with proof of the due execution thereof, and with an order confirming the sale endorsed upon the transfer or attached thereto, shall upon the expiration or four weeks after receiving the same, unless such registration is in the meantime stayed by order of the court or judge, register the transfer, cancel the existing certificate of title wholly, or in part if less than the whole of the land comprised therein be sold, grant a certificate of title to the transferee, and issue to him a duplicate certificate.

(3) In case the registration is stayed, it shall not be proceeded with until an order to that effect has been made by the court or a judge.

152. (1) A transfer of land so sold under process of law, or for arrears of taxes under any enactment in force in that behalf prior to the twenty-fourth day of June 1915, shall not be registered after a period of two months from the date of the order of confirmation, unless the period be extended by order of the court or a judge filed with the registrar.

(2) Such transfer, if not registered within that period or within the time fixed by such order, shall cease to be valid as against the owner of the land so sold, and any person or persons claiming by, from or through him.

153. (1) The application for confirmation of a sale of such land so made under any process of law may be made by the sheriff, or other

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officer making the sale, or by any person interested in the sale, on notice to the owner, unless the judge to whom the application is made dispenses with such notice.

(2) If the sale is confirmed, the costs of confirmation shall be borne and paid out of the purchase money, or as the judge directs.

(3) In case the sale is not confirmed, the purchase money paid by him shall be refunded to the purchaser, and the judge may make such order as to the costs of all parties to the sale, and of the application for its confirmation, as he thinks just.

Sale for Taxes.

154. In case land for which a certificate of title has been granted has been sold for taxes, under the provisions of any enactment in force in that behalf previously to the twenty-fourth day of June 1915, and in case registration of the transfer hereinafter mentioned has not been stayed by the order of a judge, then upon completion of the time allowed by law for redemption, and upon production of a transfer of the land (form CC) with proof of the due execution thereof by the proper officer, and a judge's order confirming the sale, the registrar shall, at the expiration of four weeks from the delivery to him of the transfer and judge's order, register the transferee as absolute owner of the lands sold, cancel the certificate of title in whole or in part as the case requires, grant a new certificate of title to the transferee, and issue to the purchaser a duplicate certificate.

155. (1) In case land is sold for taxes under the Arrears of Taxes Act or any other enactment that may be from time to time in force in Saskatchewan for collection of arrears of taxes, the tax purchaser or his assigns, when applying for title, shall furnish a tax sale certificate from the treasurer of the municipality.

(2) The registrar shall not enquire into any irregularities in a tax sale, or in any of the proceedings relating thereto, or in any of the proceedings prior to or connected with the assessment of the land, but he shall, before registering the tax purchaser or his assign as owner, satisfy himself that the sale was openly and fairly conducted.

(3) A certificate from the treasurer who conducted the sale, or from the treasurer for the time being of the municipality (where he is authorized to give such certificate), that the sale was openly and fairly conducted, shall be accepted as prima facie evidence of the fact as stated.

(4) A certificate purporting to be under the seal of the municipality and the hand of such treasurer shall be received in evidence by the registrar, without proof of the seal or of the signature, or of the official character of the person appearing to have signed the same, and without further proof whatever.

(5) The registrar shall cause to be served upon all persons, other than the tax purchaser or his assigns, who appear by the records of the land titles office, and by the last revised assessment roll of the municipality, at the time of the filing of the application for title to be interested in the lands sold, a notice requiring them, within a time therein to be limited, to contest the claim of the tax purchaser or his assign, or to redeem the land.

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(6) [Notice may be served by registered letter] but in that event he shall not issue a certificate of title for the land until the expiration of six months from the date of filing the application.

(7) In default of redemption before the registration of the applicant as owner, all persons so served with notice, or who but for the provisions of sub-section (6) would be entitled to service, shall be forever estopped and debarred from setting up any claim to or in respsct of the land sold for taxes, and the registrar shall register the person entitled under such tax sale as owner.

156. The registrar may in his discretion order that the notice mentioned in the last preceding section, and notice of any subsequent proceedings, may be served substitutionally, and such substitutional service shall have the same effect as personal service of the notice or proceeding upon the person intended to be affected thereby.

PART VII. Court and Other Proceedings.

Reference to master of titles.

157. (1) If any person is dissatisfied with an act, omission refusal, decision, direction, or order of a registrar, such person may require the registrar to set forth in writing under his hand the reasons for such act, omission, refusal, decision, direction or order, and may then apply to the master of titles by petition setting forth the grounds of his dissatisfaction.

(2) The master of titles may, upon receipt of the petition allow any of the parties interested to appear before him, and summon any other of such persons to appear and show cause, either personally or by solicitor, in relation thereto.

(3) The master of titles, having caused the registrar to be served with a copy of the petition, shall hear the petition and make such order in the premises and as to the costs of the parties appearing as the circumstances of the case require.

158. (1) The registrar may, when a question arises:

(*a*) with regard to the performance of a duty, or the exercise of a function, by this Act conferred or imposed upon him; or

(*b*) as to the true construction or validity or effect of an instrument, or as to the person entitled, or as to the extent or nature of the estate, right or interest, power or authority, of any person or class of persons; or

(*c*) as to the mode in which an entry or memorandum ought to be made in the day book or register, or upon a certificate of title or duplicate thereof; or

(*d*) as to any doubtful or uncertain right or interest, stated or claimed to be dealt with by a registrar;

refer the same in form DD to the master of titles.

(2) The master of titles may, upon the same being referred, allow any of the parties interested to appear before him, and summon any other of such persons to appear, and show cause either personally or by solicitor in relation thereto.

(3) The master of titles, having regard to the persons appearing before him, whether summoned or not, shall decide the question or

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direct any proceedings to be instituted for that purpose, and direct the particular form of entry or memorandum to be made, as under the circumstances appears to be just.

Ejectment.

159. (1) No action of ejectment, or other action for the recovery of land for which a certificate of title has been granted, shall lie against the owner under this Act, except in the case of:

(*a*) a mortgagee, as against a mortgagor in default;

(*b*) an incumbrancee as against an incumbrancer in default;

(*c*) a lessor, as against a lessee in default;

(*d*) a person deprived of land by fraud, as against the person who through such fraud has been registered as owner, or as against a person deriving title otherwise than as a transferee bona fide for value from or through such owner through fraud;

(*e*) a person deprived of or claiming any land included in any grant or certificate of title of other land, by misdescription of such other land or of its boundaries, as against the owner of such other land;

(*f*) an owner claiming under an instrument of title prior in date of registration, where two or more grants are registered, or two or more certificates of title issued, in respect of the same land;

(*g*) rights arising under any of the clauses of section 60.

(2) In any case other than the above, the production of the duplicate certificate of title, or a certified copy of such certificate, shall be an absolute bar and estoppel to any such action against the person named in such certificate as owner or lessee of the land therein described.

Action for damages.

160-163. Any person sustaining loss or damage through an omission, mistake, or misfeasance of the registrar or an official in his office in the execution of his duties, and any person deprived [M. 1913, s. 154, *ante* p. 597.]

164. (1) No action shall be brought against the registrar under sections 160 and 161, unless three months' previous notice in writing of the intended action, and of the cause thereof, has been served upon the registrar and the attorney-general of Saskatchewan, respectively.

(2) Every such action shall be brought in the Supreme Court.

[**165**: M. 1913, s. 156, *ante* p. 598.]

[**166**: B. C. 1911, s. 129, *ante* p. 574.]

167. (1) No action for recovery of damages under this Act shall lie against a registrar, unless the same is commenced within a period of six years from the date when the plaintiff was deprived of the land, or of his estate or interest therein.

(2) Any person who, at the time of such deprivation, is an infant, or person of unsound mind, may bring action within six years from the date on which the disability ceases.

168. (1) The provincial treasurer may, without action brought, pay the amount of a claim against the assurance fund, when author-

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ized so to do by the attorney-general, on a report of the registrar of the district in which the land which is the subject of the claim is situated, setting forth the facts, and a certificate from the master of titles that in his opinion the claim is just and reasonable.

(2) In such case a reasonable sum to be determined by the master of titles may be allowed the claimant for costs.

[**169**: M. 1913, s. 161, *ante* p. 598.]

170. The assurance fund shall not under any circumstances be liable for compensation for loss, damage or deprivation:

(*a*) occasioned by the owner's breach of any trust, whether express, implied or constructive; or

(*b*) in any case in which the same land has been included in two or more grants from the Crown; or

(*c*) in any case in which loss, damage, or deprivation has been occasioned by land being included in the same certificate of title with other land, through misdescription of the boundaries or parcels; unless it is proved that the person liable for compensation and damages is dead, or has absconded from the province, or has been adjudged insolvent, or the sheriff has certified that he is not able to realize the full amount and costs awarded in an action for such compensation; or

(*d*) by reason of the improper use of the seal of a corporation, or the want of capacity in a corporation to deal with the estate or interest involved, or to execute or take the benefit of the instrument registered; or

(*e*) by reason of the registration of an instrument executed by a person under legal disability, unless the fact of such disability was disclosed on such instrument.

[**171**: N. Z. 1915, s. 189, *ante* p. 505.]

Evidence and procedure.

172. In an action for an alleged breach of an implied covenant, the covenant alleged to be broken may be set forth, and it shall be lawful to allege, in the same manner as if the covenant had been expressed in words in the transfer or other instrument, any law or practice to the contrary notwithstanding, that the party against whom the action is brought did so covenant.

[**173**: V. 1915, s. 270, *ante* p. 460.]

174. (1) Every certificate of title and duplicate certificate granted under this Act shall, except:

(*a*) in case of fraud wherein the owner has participated or colluded; and

(*b*) as against any person claiming under a prior certificate of title granted under this Act in respect of the same land; and

(*c*) so far as regards any portion of the land by wrong description of boundaries or parcels included in such certificate of title;

be conclusive evidence, so long as the same remains in force and uncancelled, in all courts, as against his Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, sub-

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ject to the exceptions and reservations implied under the provisions of this Act.

(2) [M. 1913, s. 80, *ante* p. 586.]

[**175-189.** These, the remaining sections under the heading "Evidence and procedure," relate to procedure only, and are re-enactments almost without change of sections in the repealed statute of 1909. S. 178 contains a new sub-section, and s. 183 is new; otherwise this group of sections re-enacts the following sections of Sas. 1909 (printed in Can. Torr. Syst. 525-528): 165, 166, 171-176, 178-182, 185.]

PART VIII. MISCELLANEOUS PROVISIONS.

Assurance fund and fees.

190. (1) Before the registrar shall perform any duty under the provisions of this Act, he shall, except as herein otherwise provided, demand and receive the proper fees therefor, as fixed and settled by a tariff to be made from time to time by the Lieutenant Governor in Council. He shall also demand and receive for the assurance fund, upon the registration of every grant of land subject to any registered lien or charge, and upon every absolute transfer of land, one-fifth of one per cent. of the value of the land transferred if such value amounts to or is less than five thousand dollars, and one-tenth of one per cent. on the additional value when such value exceeds five thousand dollars.

(2) Upon every subsequent transfer he shall demand and receive, upon the increase of value since the granting of the last certificate of title, one-fifth of one per cent. if the increase is not more than five thousand dollars, and one-tenth of one per cent. on any excess over such five thousand dollars.

[**191-193**: Sas. 1909, ss. 152-154, Can. Torr. Syst. 518.]

Dealings with registered owner.

194. (1) No person contracting or dealing with, or taking or proposing to take a transfer, mortgage, incumbrance or lease from, the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to enquire into or ascertain the circumstances in, or the consideration for, which the owner, or any previous owner of the land, is or was registered, or to see to the application of the purchase money, or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding.

(2) Knowledge on the part of any such person, that any trust or unregistered interest is in existence, shall not of itself be imputed as fraud.

Joint ownership.

195. (1) Upon the transfer to two or more persons as joint owners of any land for which a certificate of title has been granted, to be held by them as trustees, it shall be lawful for the transferor to insert in the transfer or other instrument the words "no survivorship," and the registrar shall in such case include such words in the

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duplicate certificate issued to such joint owners pursuant to the transfer, and in the certificate of title.

(2) Any two or more persons, so registered as joint owners of any land held by them as trustees, may by writing under their hand, authorize the registrar to enter the words "no survivorship" upon the duplicate certificate, and also upon the certificate of title.

(3) In either case, after such entry has been made and signed by the registrar, it shall not be lawful for any less number of joint owners than the number so entered to transfer or otherwise deal with the land, without obtaining the sanction of the court or of a judge, by an order on motion or petition.

196. (1) Before making any order as aforesaid, the court or judge shall, if deemed requisite, cause notice of the application to be properly advertised, and in such case appoint a period of time within which any person interested may show cause why the order should not be made; and thereupon the said court or judge may order the transfer of the land to any new owner or owners, solely or jointly, with or in the place of any existing owner or owners, or may make such order in the premises as seems just, for the protection of the persons beneficially interested in the land, or in the proceeds thereof.

(2) Upon such order being deposited with the registrar, he shall make a memorandum thereof upon the certificate of title, and upon the duplicate certificate; and thereupon the person or persons named in the order shall be the owner or owners of the land.

Tenants in common.

197. Whenever by letters patent, transfer, conveyance, assurance or other assignment, land or an interest therein is granted, transferred, conveyed, or assigned to two or more persons, other than executors or trustees, in fee simple or for any less estate, legal or equitable, such persons shall take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, conveyance, assurance or other assignment, that they shall take as joint tenants.

No estates tail.

198. No estate in fee simple shall be changed into any limited fee or fee tail, but the land, whatever form of words is used in any transfer, transmission or dealing, shall, except as hereinafter otherwise provided, be and remain an absolute estate in the owner for the time being.

199. Any limitation, which heretofore would have created an estate tail, shall transfer the absolute ownership or the greatest estate that the transferor had in his land.

Married women.

200. When land is transferred to a man and his wife, the transferees shall take according to the tenor of the transfer, and they shall not take by entireties, unless it is so expressed in the transfer.

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201. A man may make a valid transfer of land to his wife, and a woman may make a valid transfer of land to her husband, without in either case the intervention of a trustee.

202. The registrar, upon application to him by a married woman, and upon production of the duplicate certificate of title issued to her prior to marriage, accompanied by her affidavit of her marriage, giving the date of same, the place where solemnized, and her husband's full name, residence and occupation, shall make a memorandum of such facts upon the certificate of title, cancel the existing certificate and the duplicate thereof, and grant a new certificate to the applicant owner in her newly acquired name, such certificate giving her husband's full name, residence and occupation, and shall issue to her a duplicate certificate.

Infants, idiots and lunatics.

203, 204. When any person . . . is an infant, idiot or lunatic, the guardian or guardians of the estate of such a person may, when thereunto authorized by order of the court or a judge, make such application [Sas. 1909, ss. 160, 161, Can. Torr. Syst. 521.]

General.

205. Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of actual fraud, or over contracts for the sale or other disposition of land for which a certificate of title has been granted.

[**206**: Sas. 1909, s. 184, Can. Torr. Syst. 528.]

207. (1) Every owner or mortgagee of land for which a certificate of title has been granted shall deliver to the registrar a memorandum in writing of a post-office address within the province, to which it shall be sufficient to mail all notices that under this Act are required to be sent to an owner or mortgagee.

(2) Every owner shall, if required by the registrar so to do, before the delivery of any duplicate, sign a receipt therefor in his own handwriting, or otherwise furnish the registrar with his signature so as to prevent personation as far as possible.

(3) Every owner or mortgagee shall from time to time notify the registrar of any change in his post-office address: provided that the registrar may proceed without such memorandum of address.

208. A purchaser, mortgagee, or incumbrancee for valuable consideration shall not be affected by the omission to send any notice by this Act directed to be given, or by the nonreceipt thereof.

209. The registrar may require evidence that any person making a transfer, mortgage, incumbrance or lease, is of the full age of twenty-one years.

210. Where in this Act a time is limited for filing any document, or taking any proceeding, and through accident, mistake or inadvertence, the time thus limited has been allowed to expire without such document being filed or proceeding taken, a judge may nevertheless, upon such terms as may seem just, extend the time so limited; but such enlargement shall be subject to the rights of third persons accrued

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by reason of the failure or omission to file the document or take the proceeding within the time limited.

Forms and regulations.

211. The forms referred to in this Act are the forms contained in the second schedule hereto.

[212, 213: Sas. 1909, ss. 183, 188, Can. Torr. Syst. 528, 529.**]**

214. The Lieutenant Governor in Council may from time to time provide a tariff of fees for services in connexion with this Act to be charged by solicitors, and the fees to be charged by such solicitors for such services shall be according to such tariff.

215. (1) The Lieutenant Governor in Council may make, and from time to time alter, such regulations as he may deem expedient as to when and under what circumstances costs may be charged in proceedings taken or instituted under sections 108-115 both inclusive of this Act, and may fix and settle, and from time to time alter, a tariff of the costs which may be charged in such proceedings, and such regulations and tariff shall have the same effect as if incorporated in and forming a part of this Act.

(2) Notwithstanding anything contained in any mortgage or in any agreement, no mortgage[1] shall charge, take, or receive any other or greater costs for or in respect of such proceedings than such as are fixed by the said tariff.

(3) Such costs shall, at the request of any party interested or affected by such proceedings, be taxed by the registrar, upon giving such notice as the registrar may direct.

(4) The provisions of this section shall apply to all mortgages whenever made.

216. The following enactments are hereby repealed:

The Revised Statutes of Saskatchewan 1909, c. 41.
1 George V, 1910-11, c. 12.
2 George V, 1912, c. 16.
3 George V, 1912-13, c. 16.
4 George V, 1913, c. 30.
5 George V, 1914, c. 20, s. 3.
6 George V, 1915, c. 30.
6 George V, 1916, c. 28.
7 George V, 1917, c. 34, s. 8.

217. This Act shall come into force on the first day of May 1918.

[1] A misprint for "mortgagee."

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FIRST SCHEDULE.

BOUNDARIES OF LAND REGISTRATION DISTRICTS (*Section 3*).

. . . . . .

SECOND SCHEDULE.

[FORMS. These for the most part are as in the repealed statute of 1909 (Can. Torr. Syst. 530 *et seq.*), but with alterations introduced from time to time by amending statutes. The chief alterations are:

Covenant to pay taxes is added to the short forms of covenants in lease (f. O *post*);

References to existing incumbrances are omitted in leases and incumbrances;

Transfer is slightly altered, and requirement of diagram omitted;

Power of attorney is altered, and additional form inserted.]

. . .

FORM O.

(*Section 96 (1).*)

Short covenants in lease.

COLUMN ONE.	COLUMN TWO.
1. Will pay taxes.	1. That I, the said lessee, will pay all taxes, rates, duties and assessments whatsoever, whether municipal or provincial, now charged or hereafter to be charged upon the said demised premises, or upon the said lessor on account thereof, except municipal taxes for local improvements or works assessed upon the property benefited thereby.
2. Will not without leave, assign or sublet.	2. That I, the said lessee, will not [Sas. 1909, sch. f. K. Can. Torr. Syst. 539, 540, omitting in every case "executors, administrators" and "transferees" throughout the five covenants.]

. . . . . .

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ALBERTA.

LAND TITLES ACT

(*Statutes 1906, c. 24*).

NOTE.—The Act of 1906 is the original statute passed in Alberta, and has been amended in nearly every succeeding year to 1919 since 1906. The original Act and its amendments down to 1912 are printed in a consolidated form in Can. Torr. Syst. 551 *et seq.* These and subsequent amendments (to April, 1919) are embodied in those sections that are here printed in full. Only such sections are so printed as differ materially from enactments in other jurisdictions. The sections that are altogether omitted are for the most part to be found in Can. Torr. Syst. and usually do not differ from corresponding enactments in the Saskatchewan statute; these sections are mostly procedural, or otherwise of less importance. Generally, the present Act as amended resembles closely the Saskatchewan Act of 1917, though the sections are arranged differently, and the drafting is often different.

. . .

2. [Sas. 1917, s. 2, *ante* p. 600, except as to the following terms:]

. . . . . .

(*c*) The expression "transfer" means the passing of any estate or interest in land under this Act, whether for valuable consideration or otherwise.

(*d*) The expression "transferor" means the person by whom any interest or estate in land is transferred, whether for value or otherwise, and the expression "transferee" means the person to whom any interest or estate in land is transferred, whether for value or otherwise.

(*e*) The expression "mortgage" means any charge on land created merely for securing a debt or loan.

(*f*) The expression "mortgagee" means the owner of a mortgage; and the expression "mortgagor" means the owner or transferor of land, or of any estate or interest in land, pledged as security for a debt or a loan.

.

(*j*) The expression "person of unsound mind" means any person not an infant who, not having been found to be a lunatic, has been found on like enquiry to be incapable from infirmity of mind of managing his own affairs.

. . .

(*u*) The expression "transmission" applies to change of ownership consequent upon death, lunacy, sale under execution, order of court or other act of law, sale for arrears of taxes, or upon any settlement or any legal succession in case of intestacy.

. . . .

[**20.** (1): M. 1913, s. 12, *ante* p. 580.

(2) Sas. 1917, ss. 50, 51, *ante* p. 608, but omitting references to creditors' assignments, sale by mortgagee, and foreclosure order.]

[**21**: Sas. 1917, s. 27 (1), *ante* p. 604.]

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[**22**: Sas. 1917, s. 49, *ante* p. 608.

[**23**: Sas. 1917, ss. 63, 58 (2), *ante* pp. 611, 610.]

[**24, 25**: Sas. 1917, s. 54, *ante* p. 609.]

26. [(1-4): Sas. 1917, ss. 46-48, *ante* p. 607.]

(5) The owner of any estate leased or demised to him, or to the person from whom he claims a title, for a life or for lives, or for a term of more than three years, in any land for which the grant from the Crown has been registered, may apply to have his title registered, and to have a certificate of title issued to him therefor under the provisions of this Act.

(6) A notification received by the registrar from the minister of public works of the abandonment by the Crown of any roads or road allowances or trails, which now are or which may hereafter be vested in the Crown in the right of the province, shall have the same effect as a patent issued by the Crown to the person in such notification mentioned as transferee, and shall be so treated by the registrar. The notification shall state the nature of the grant, and shall specify any mines, minerals, easements or rights which are excepted therefrom.

(7) In case any land is expropriated, or any street or portion of a street is closed, by by-law of any municipality pursuant to any ordinance of the Territories or Act of the legislature of Alberta, a judge of the Supreme Court may direct that such by-law be registered in the land titles office for the land registration district in which the land or the street or portion of a street affected lies, and upon the by-law being registered the registrar upon payment of the proper fees shall give a certificate of title to the municipality for the land expropriated, or the land comprised in the street or portion of the street closed, by the by-law: provided that the judge before directing the registration of any such by-law may direct notice of the application of the municipality to be given to such persons as he deems interested therein.

(8) A certified copy of an order in council passed by the Dominion Government, or other notification that the land therein described in such order in council or notification has been granted to the province, shall have and be of the same effect as a patent issued by the Crown, and shall be so treated by the registrar.

27. (1) The owner of any estate or interest in any land, whether legal or equitable, letters patent for which issued from the Crown before the first day of January 1887, or which otherwise had prior to that date passed from the Crown, may apply to have his title registered nnder the provisions of this Act.

[(2): Sas. 1917, s. 31 (3), *ante* p. 605.]

[**28-31**: Sas. 1917, ss. 32-38, *ante* p. 605.]

[**32-36**: Sas. 1917, ss. 40-44, *ante* p. 606.]

37. Upon every transfer of land mentioned in a certificate of title, the certificate of title to be granted shall be granted by the registrar, and a duplicate shall be issued to the transferee on application.

[**38**: Sas. 1917, s. 207, *ante* p. 641.]

[**39**: Sas. 1917, ss. 27 (2), 52 (1, 2), *ante* pp. 604, 608.]

Effect of registration.

[**40**: Sas. 1917, s. 64 (1), *ante* p. 611.]

41. After a certificate of title has been granted for any land, no instrument until registered under this Act shall be effectual to pass

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any estate or interest in any land (except a leasehold interest for three years or for a less period), or render such land liable as security for the payment of money; but upon the registration of any instrument in the manner hereinbefore prescribed, the estate or interest specified therein shall pass, or as the case may be the land shall become liable as security, in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument, or by this Act declared to be implied in instruments of a like nature.

42 [(1): Sas. 1917, s. 59, *ante* p. 610.]

(2) Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which he or any person through whom he derives title has held possession.

[**43**: Sas. 1917, s. 60, *ante* p. 611, clauses (*a*) to (*f*), omitting in clause (*b*), "*and the rights of purchasers at tax sales,*" and adding:

(*g*) Any right of way or other easement granted or acquired under the provisions of any Act or law in force in the province.]

[**44**: Sas. 1917, s. 174, *ante* p. 638.]

[**45**: Sas. 1917, s. 208, *ante* p. 641.]

46. After the certificate of title for any land has been granted, no instrument shall be effectual to pass any interest therein, or to render the land liable as security for the payment of money, as against any bona fide transferee of the land under this Act, unless such instrument is executed in accordance with the provisions of this Act and is duly registered thereunder; and the registrar shall have power to decide whether any instrument which is presented to him for registration is substantially in conformity with the proper form in the schedule to this Act or not, and to reject any instrument which he may decide for any reason to be unfit for registration: provided that no instrument under which an interest in any land is claimed or dealt with on behalf of any company, joint stock company or corporation shall be registered until satisfactory evidence is produced to the registrar that such company, joint stock company or corporation is not in arrear for any tax or fee imposed thereon under the Corporations Taxation Act.

[**46A.** The registrar shall accept for registration and register duplicate originals, or copies duly certified under the hand of the deputy minister or acting deputy minister of the interior and the seal of the department of the interior, of any leases or other registrable instrument or instruments in connexion with or relating to the title to lands situate within the area set apart for Dominion parks.

[**47**: Sas. 1917, s. 62, *ante* p. 611.]

Transfers.

48. When land for which a certificate of title has been granted is intended to be transferred, or any right of way or other easement is intended to be created or transferred, the owner may execute a transfer in the form J in the schedule to this Act, which transfer shall, for description of the land intended to be dealt with, refer to the certificate of title of the land, or shall give such description as is sufficient to identify the same, and shall contain an accurate statement of the

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estate, interest or easement intended to be transferred or created, and a memorandum of each lease, mortgage or other incumbrance to which the land is subject.

[**49.** Whenever an easement or any incorporeal right in or over any land for which a certificate of title has been granted is created, for the purpose of being annexed to or used and enjoyed together with other land for which a certificate of title has also been granted, the registrar shall make a memorandum of the interest creating such easement or incorporeal right upon the folio of the register which constitutes the existing certificates of title of such other land, and upon the duplicate thereof.

50: Sas. 1917, s. 77, *ante* p. 614.]

51. The registrar, upon cancelling any certificate of title either wholly or partially pursuant to any transfer, shall grant to the transferee a certificate of title of the land mentioned in the transfer and issue to the transferee a duplicate thereof, and the registrar shall retain every transfer and cancelled duplicate certificate of title; but in the case of a partially cancelled certificate of title the registrar shall return the duplicate to the transferor, after the memorandum partially cancelling the same has been made thereon and upon the certificate of title in the register, or may whenever required thereto by the owner of an unsold portion of land in any partially cancelled certificate of title, or where such a course appears to the registrar more expedient, grant to such owner a certificate of title for such portion of which he is the owner, upon the delivery of the partially cancelled duplicate certificate of title to the registrar to be cancelled and retained.

52. (1) In every instrument transferring land for which a certificate of title has been granted, subject to mortgage or incumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest [&c., M. 1913, s. 97, *ante* p. 588.]

(2) Where a transferee declines to register any such transfer, the transferor or the mortgagee may by notice call upon the transferee, or such other person or persons as the judge may direct, to shew cause why the same should not be registered, and upon the return thereof the judge may order the registration of the said transfer within a time named, or make such further or other order, and on such terms as to costs and otherwise, as to him seems meet.

[**53**: Sas. 1917, s. 79, *ante* p. 614, but with detailed directions.]

[**53A**: Sas. 1917, s. 81, *ante* p. 616, adding detailed directions.]

53B. The provisions of section 53A, except sub-section (*g*) thereof, shall mutatis mutandis apply to every person, firm, company or corporation constructing any gas or oil pipe line, or any other transmission line, pipe or conduit for which a right of way is acquired.

Leases.

[**54**: Sas. 1917, s. 92 (1, 4, 5), *ante* p. 619.]

[**55**: Sas. 1917, s. 93, *ante* p. 620, adding covenant to pay "all rates and taxes which may be payable in respect of the demised land during the continuance of the lease."]

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56. [Sas. 1917, s. 94, to end of clause (*a*), *ante* p. 620.]

(*b*) That in case the rent, or any part thereof, is in arrear for the space of two calendar months, or in case default is made in the fulfilment of any covenant whether expressed or implied in such lease, on the part of the lessee, and is continued for the space of two calendar months, or in case the repairs required by such notice as aforesaid are not completed within the time therein specified, the lessor may enter upon and take possession of the demised land.

[**57-59.** Sas. 1917, ss. 95-97, *ante* p. 620.]

Mortgages and incumbrances.

60. [(1): Sas. 1917, s. 98, *ante* p. 621.]

(2): Sas. 1917, s. 100, *ante* p. 622.]

(3) Provided however that nothing herein contained shall entitle a settler who has entered for a homestead, or homestead and pre-emption under the provisions contained in the Dominion Lands Act, to mortgage the land entered for by him as a homestead or pre-emption prior to issue of a patent to him therefor, same in so far as is permitted by the said Act.

[**61**: Sas. 1917, s. 102, *ante* p. 622.

62. (1) Proceedings for recovery of money secured by a mortgage or incumbrance, or to enforce any provision thereof, or sale, redemption, or foreclosure proceedings with respect to mortgaged or incumbered land may be taken in any court of competent jurisdiction, in accordance with the existing practice and procedure thereof.

(2) No execution to enforce a judgment upon the personal covenant contained in a mortgage, incumbrance or agreement of sale on or of land, or on any security therefor, shall issue or be proceeded with until sale of land, and levy shall then only be made for the amount of the said moneys remaining unpaid after the due application of the purchase moneys received at the said sale.

(3) As long as execution cannot issue or be proceeded with under the provisions of this section, the payment of the money secured by a mortgage or an agreement for sale of land shall not be enforced by attachment or garnishment, or by the appointment of a receiver, or by any other process of a similar nature.

(4, 5) A judge of the Supreme Court [may order that sub-ss. 2 and 3 are not to apply to a mortgage, and any such order may be varied or set aside].

62A. (1) In case default is made in payment of the principal sum, interest, annuity or rent-charge, or a part thereof, secured by any mortgage or incumbrance registered under this Act, or in case default is made in the observance of any covenant, expressed in any mortgage or incumbrance or herein declared to be implied in such instrument, and in case such default continues for the space of one calendar month, or for such longer period of time as may therein for that purpose be expressly limited, the mortgagee or incumbrancee may forthwith, after giving the notice herein provided, enter into possession of the lands and receive and take the rents, issues and profits thereof, and whether in or out of possession thereof may make any lease of the same, or any part thereof, as he may see fit.

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(2) Such notice shall declare the intention of the mortgagee or incumbrancee to so enter into possession and receive and take the rents, issues and profits as aforesaid, and shall contain a statement that in case default continues for the further space of two calendar months from the date of service of the notice, the mortgaged lands may be sold under the provisions of the Land Titles Act.

(3) The said notice may also require the mortgagor or incumbrancer, and the other persons to whom the same is directed, to pay within a time to be specified in such notice the money then due or owing on such mortgage or incumbrance, or to observe the covenants therein expressed or implied, as the case may be.

(4) Such notice may declare the intention of the mortgagee or incumbrancee to make an application for foreclosure as hereinafter provided, in case a sale of the lands by public auction shall prove abortive, and in case default in payment of the principal or interest secured by the mortgage or incumbrance shall be continued for six months after the time for payment mentioned in the mortgage or incumbrance.

(5) A copy of the notice shall be served upon the mortgagor or incumbrancer, and upon every person appearing by the records of the proper land titles office at the time of filing such notice to have any right, estate, or interest to or in the land charged subsequent to the mortgage or incumbrance, and within two months after such service upon all such persons a copy shall be filed with the registrar of the proper land titles office.

(6) After such default in payment, or in the observance of any covenant as aforesaid, continuing for the further space of two calendar months from the date when service upon all such parties has been completed, such mortgagee or incumbrancee is hereby authorized and empowered to sell the land so mortgaged or incumbered, or any part thereof, subject to the rights of any persons having any estate, right or interest therein having priority to the mortgage or incumbrance, in such manner as the registrar of land titles for the land registration district in which the mortgage or incumbrance is registered may direct, and either altogether or in lots, by public auction or private contract, or by such modes of sale and subject to such terms and conditions as the registrar may prescribe, and such sale shall be confirmed by an order under the hand of the registrar.

[(7): Sas. 1917, s. 110 (1, 2), *ante* p. 624.]

(8) Such purchase money shall be paid into the Supreme Court in the judicial district in which the land is situate, and there shall be paid thereout upon the request of the mortgagee—

(*a*) The costs as taxed by the registrar;

(*b*) The moneys due or owing to the mortgagee or incumbrancee and proved before the registrar;

and when such payments are duly made, the balance (if any) remaining in court shall be paid out on order of a judge in payment of the subsequent mortgage (*sic*), incumbrances or liens (if any), in order of their priority, and the balance (if any) to the owner or beneficial owner as his interest may appear.

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[(9): Sas. 1917, s. 111, *ante* p. 625.]

(10) Whenever default has been made in payment of the principal or interest secured by a mortgage or incumbrance, and such default shall be continued for six months after the time for payment mentioned in the mortgage or incumbrance, the mortgagee or incumbrancee may, if he has given notice of his intention so to do as aforesaid, make an application in writing to the registrar of land titles for the registration district in which the mortgage or incumbrance is registered for an order for foreclosure.

(11) Such application for foreclosure shall state that such default in payment as aforesaid has been made and has continued for the period aforesaid; that the land mortgaged or incumbered has been offered for sale at public auction under the provisions of this Act; that the amount of the highest bid was not equal to nor greater than the reserve bid fixed by the registrar; and that such notice as aforesaid declared the intention of the mortgagee or incumbrancee to make an application for foreclosure in case such sale proved abortive; and such application shall be accompanied by such proof of the matters stated by the applicant, and by such other evidence, as the said registrar may require.

(12) In case the notice as aforesaid has not declared the intention of the mortgagee or incumbrancee to make an application for foreclosure, another notice may be given declaring such intention, if default in payment has continued for six months after the time for payment mentioned in the mortgage or incumbrance, and in case a sale of the lands has proved abortive, and when such subsequent notice has been given the application for foreclosure as herein provided may be proceeded with.

(13) Such subsequent notice shall be filed and served in the same manner and upon the same persons as provided for in sub-section 5 hereof.

(14) Unless the registrar shall see fit to order otherwise the notice, whether of intention to sell or to apply for a foreclosure order, shall be served personally, but in case any person required to be served cannot after due diligence be found, the registrar may direct service of such notice by leaving the same on the mortgaged lands, or by mailing the same in a sealed envelope by registered post directed to him or them at his or their last known address, or in such other manner as the registrar may direct; and in case any person required to be served is deceased and such person has no legal representative, such notice shall be effectively served if served upon the public administrator for the district in which the lands subject to the mortgage or incumbrance are situate.

(15) On an application for foreclosure the registrar may issue to such applicant an order nisi, in which he may direct that the applicant cause the land to be advertised for private sale, and directing that a final order may be made unless within the time provided for in such order nisi, which shall be not less than one month from the date thereof, a sufficient amount of money has been paid by or on behalf of the owner, mortgagor, or incumbrance (*sic*) to satisfy the principal, interest and costs of the proceedings, or a sufficient amount of

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money has been realized from the sale of such land to satisfy the reserve bid: provided that the registrar may confirm a sale at any time before the final order of foreclosure has been granted, and may approve of any sale at an amount less than the reserve bid.

(16, 16A). Every order of foreclosure, and every order confirming a sale under the hand of the registrar, shall contain a clause that possession of the lands mentioned therein shall be given to the mortgagee or purchaser forthwith [sheriff to enforce order, and costs to be paid by person dispossessed.]

(17) Where a mortgagor is entitled to redeem, he shall on payment have the power to require the mortgagee instead of giving a discharge of the mortgage to transfer the mortgage to any third party as the mortgagor directs, and the mortgagee shall be bound to transfer such mortgage to such third party.

[(18) A judge or a master may by order stay any proceeding hereunder, and cancel such stay.]

[19, 20. Service of notices.]

62B. The effect of an order for foreclosure of a mortgage or incumbrance, heretofore or hereafter made by any court or judge or by any registrar, shall be to vest the title of the land affected thereby in the mortgagee or incumbrancee, free from all right and equity of redemption on the part of the owner, mortgagor or incumbrancer, or any person claiming through or under him subsequently to the mortgage or incumbrance, and shall from and after the date of the passing of this section [1919] operate as full satisfaction of the debt secured by such mortgage or incumbrance. Such mortgagee or incumbrancee shall be deemed a transferee of the land, and become the owner thereof, and be entitled to receive a certificate of title for the same.

63. Upon the production of any mortgage or incumbrance, having endorsed thereon or attached thereto a receipt or acknowledgment in the form I in the schedule to this Act, signed by the mortgagee or incumbrancee or, where it is stated in the mortgage or incumbrance that the money has been advanced on joint account, by the surviving mortgagee or incumbrancee, and proved by the affidavit of an attesting witness, discharging the whole or any part of the land comprised in such instrument from the whole or any part of the principal sum or annuity secured thereby, or upon proof being made to the satisfaction of a judge of the payment of all or part of the money due on any mortgage or incumbrance and the production to the registrar of a certificate signed by the judge to that effect, or upon the production of a receipt or acknowledgment in the said form I, accompanied by evidence satisfactory to the registrar of the loss or destruction of the mortgage or incumbrance, the registrar shall thereupon make an entry on the certificate of title noting that such mortgage or incumbrance is discharged wholly or partially, or that part of the land is discharged as aforesaid, as the case may require; and upon such entry being so made, the land or the estate or interest in the land or the portion of the land mentioned or referred to in such endorsement as aforesaid shall cease to be subject to or liable for such principal sum or annuity or, as the case may be, for the part thereof mentioned in such entry or discharge.

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64. Upon proof of the death of the annuitant, or of the occurrence of the event or circumstance upon which in accordance with the provisions of any incumbrance the annuity or sum of money thereby secured ceases to be payable, and upon proof that all arrears of the said annuity and interest or money have been paid, satisfied or discharged, the registrar shall, upon the order of a judge, make a memorandum upon the certificate of title in the register that such annuity or sum of money is satisfied and discharged, and shall cancel such instrument; and upon such memorandum being made the land shall cease to be subject to or liable for such annuity or sum of money, and the registrar shall in any or either such case as aforesaid endorse on the duplicate certificate of title a similar memorandum whenever such duplicate certificate of title is presented to him for that purpose.

[**65**: Sas. 1917, ss. 120, 121, *ante* p. 627. Omit reference to mortgagee being "*deceased*," and substitute "a chartered bank" for "*the provincial treasurer*."]

[**66**: Sas. 1917, ss. 122 (1-3), 123, *ante* p. 627.]

[**67, 68**: Sas. 1917, s. 124, *ante* p. 628.]

[**69-70**: Sas. 1917, ss. 104, 105, *ante* p. 623.]

71. In every case where land is subject to a mortgage or incumbrance signed by the owner, the duplicate certificate of title shall be deposited with the registrar, who shall retain the same on behalf of all persons interested in the land mentioned in such certificate. The registrar shall if desired furnish to the owner of such mortgage or incumbrance a certificate of charge in form GG hereto; and before any instrument dealing with or discharging the said mortgage or incumbrance is registered, except in the case provided for by section 65 of this Act, said certificate of charge shall be delivered up to the registrar to be cancelled: provided however that the registrar may dispense with such production upon satisfactory evidence being produced of the loss or destruction of any such certificate.

Powers of attorney.

72. The owner of any land may authorize and appoint any person to act for him or on his behalf with respect to the transfer or other dealing with such land, or with any part thereof, in accordance with the provisions of this Act, by executing a power of attorney in the form T in the schedule to this Act, or as near thereto as circumstances permit, or in any form heretofore in use for the like purpose, in which the land is not specifically mentioned and described but is mentioned and referred to in general terms, any of which forms of power of attorney the registrar shall register, and if the land referred to in any form of power of attorney is specifically and properly described, the registrar shall make a memorandum upon the certificate of title, and upon the duplicate certificate, of the particulars therein contained, and of the time of its registration; and until such power of attorney in which the land referred to is so specifically described is revoked in the manner provided by the next following section, the right of the owner to transfer or to otherwise deal with the land shall be suspended: provided that the execution or registration of a general power

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of attorney shall not in any way affect the right of the owner to transfer or otherwise deal with his land.

73. Any such power of attorney may be revoked by a revocation in the form U in the schedule to this Act; and after the registration of a revocation of a power of attorney the registrar shall not register any transfer or other instrument made under such power of attorney, unless such transfer or other instrument was executed prior to the revocation of the power of attorney.

74. (1) Wherever the owner of any land for which a certificate of title has been granted dies, such land shall, subject to the provisions of this Act, vest in the personal representative of the deceased owner.

(2) Such personal representative shall, before dealing with such land, make application in writing (executed by himself or his solicitor) to the registrar to be registered as owner, and shall produce to and leave with the registrar the duplicate certificate of title for the lands in respect of which the application is made, and probate of the will of the deceased owner, or letters of administration, or the order of court authorizing him to administer the estate of the deceased owner, or a notarial copy of the will of the deceased made in notarial or authentic form, executed within the province of Quebec, the original of which is filed in any notarial office, or a duly certified copy of the said probate, letters of administration or order, as the case may be; for the purpose of this Act the probate of a will granted by the proper court of any province of the Dominion of Canada, or of the United Kingdom of Great Britain and Ireland, or an exemplification thereof, shall be sufficient, if the same shall have been re-sealed with the seal of the court in the province of Alberta having jurisdiction in such matters.

(2A) Such personal representative shall also produce to and leave with the registrar a certificate of the provincial treasurer to the effect that all succession duties in respect of the said land (if any) have been paid, or security given for the payment thereof.

(3) The registrar shall thereupon enter upon the said certificate of title and upon the duplicate thereof a memorial of the application for transmission, the date of the probate, letters of administration, order of the court or notarial will, the date and hour of the production to him of the same, and such other particulars as he may deem necessary, and shall also note the fact of registration by the usual memorandum under his hand on the said probate, letters of administration, order or notarial will.

(4) Upon such memorandum being made the executor or administrator, as the case may be, shall be deemed to be the owner of the land, and the registrar shall cancel the said certificate of title in the name of the deceased owner, and grant to the executor or administrator aforesaid as such a new certificate of title, and issue to him a duplicate certificate.

(5) The title of the executor or administrator to the lands shall relate back, and take effect from the date of the death of the deceased owner.

(6) If the certificate of title for the land has not been granted to the deceased owner, the personal representatives before being entitled

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to be registered under this section shall bring the land under this Act in the ordinary way, but no certificate of title shall be granted in respect thereof, unless such personal representative shall produce to and leave with the registrar a certificate of the provincial treasurer [&c., sub-s. 2A, *supra*.]

75. (1) Whenever any mortgage, incumbrance or lease affecting land for which a certificate of title has been granted is transmitted in consequence of the will or intestacy of the owner thereof, the probate of the will [&c., s. 74 (2), *supra*] accompanied by an application in writing from the executor or administrator, or such other person as aforesaid, claiming to be registered as owner in respect of such estate or interest, together with a certificate of the provincial treasurer [&c., s. 74 (2A), *supra*] shall be produced to and left with the registrar, who shall thereupon make a memorandum upon the certificate of title and upon the duplicate thereof of the date of the will and of the probate, or of the letters of administration or order of the court as aforesaid, the date, hour and minute of the production of the same to him, with such other particulars as he deems necessary.

(2) Upon such memorandum being made, the executor or administrator, or such other person, as the case may be, shall be deemed to be the owner of the mortgage, incumbrance or lease; and the registrar shall note the fact of the registration by memorandum under his hand on the letters of administration, probate or order as aforesaid.

76. [(1): Sas. 1917, s. 146 (1), *ante* p. 632, omitting reference to "*following sub-section.*]

(2) Any person beneficially interested in any such land may apply to a court or judge having jurisdiction, to have the same taken out of the hands of the trustee having charge by law of such land, and transferred to some other person or persons, and the court or judge upon reasonable cause being shewn shall name some suitable person or persons as owner of the land; and upon the person or persons so named accepting the ownership and giving approved security for the due fulfilment of the trusts, the court or a judge may order the registrar to cancel the certificate of title to the trustee, and to grant a new certificate of title to the person or persons so named.

(3) The registrar, upon the production of the order, shall cancel the certificate of title to the trustee, after making thereon and upon the duplicate thereof a memorandum of the appointment by order of the court or judge of such person or persons as owners, and shall grant a new certificate of title to such new trustee and issue to him a duplicate certificate of title.

Executions.

77. (1) [Sas. 1917, s. 149 (1), *ante* p. 633]; and upon and from the receipt by the registrar of such copy, all lands and interests in lands, whether such interests be legal or equitable, and any interest of an unpaid vendor of land, shall be bound by such execution.

[Sas. 1917, s. 149 (3, 4), *ante* p. 633]: provided that every writ or renewal thereof shall cease to bind or affect land at the expiration of six years from the date of the receipt thereof by the registrar of the

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district in which the land is situated, unless before the expiration of such period of six years a renewal of such writ is filed with the registrar in the same manner as the original is required to be filed with him.

(2) The registrar shall keep a book in convenient form in which shall be entered, according to the dates when respectively received, a record of all copies of writs received.

(3) A writ of execution transmitted to any registrar by a sheriff at any time during the currency of such writ shall be effectual as hereinbefore provided with respect to lands belonging to the execution debtor, situate anywhere within the land registration district, whether or not such lands are within the judicial district of the sheriff to which (*sic*) the said writ is directed, and whether or not such judicial district is within the land registration district of the registrar to which (*sic*) a copy of such writ has been transmitted.

[4, 5, 6. Renewal of writs, and endorsement of full name, etc., of debtor on writ.]

[**78**: Sas. 1917, s. 150, *ante* p. 634.]

Sheriff's sales.

[**79-81**: Sas. 1917, ss. 151-153, *ante* p. 634.]

Sale for taxes.

82. When any land for which a certificate of title has been granted is sold for taxes, the purchaser may at any time after the sale lodge a caveat against the transfer of the land; and upon the completion of the time allowed [&c., Sas. 1917, s. 154, *ante* p. 635.]

[**83**: Sas. 1917, s. 202, *ante* p. 641.]

[**83A**: M. 1913, s. 129, *ante* p. 594.]

Caveats.

84. Any person claiming to be interested under any will, settlement or trust deed, or any instrument of transfer or transmission, or under an unregistered instrument, or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person, or otherwise howsoever in any land, mortgage or incumbrance, may cause to be filed on his behalf with the registrar a caveat in form W in the schedule to this Act, against the registration of any person as transferee or owner of, or of any instrument affecting, such estate or interest, unless such instrument be expressed to be subject to the claim of the caveator.

85. [(1): M. 1913, s. 141 (1), *ante* p. 596.]

(2) If in any caveat presented for registration a caveator claims to be interested under an unregistered mortgage, he shall either attach to such caveat a copy of such mortgage, or state in such caveat the amount for which the mortgage was given. The fees payable for

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registration of such caveat shall be the same as if the mortgage under which the caveator claims to be interested were being registered.

[**86**: Sas. 1917, s. 133, *ante* p. 630.]

[**87**: B. C. 1911, s. 65, *ante* p. 564.]

88. The caveator, or in case the caveat is signed by his attorney or agent such attorney or agent, may by notice in writing to the registrar withdraw his caveat at any time, and the registrar shall forthwith give notice in writing of such withdrawal by mail or otherwise to the caveator.

89. Except in case of a caveat lodged by the registrar as hereinafter provided, every caveat lodged against any land, mortgage or incumbrance shall be deemed to have lapsed after the expiration of sixty days after notice, proved to the satisfaction of the registrar, has been either served as process is usually served or sent by registered mail in the form Y in the schedule to this Act or to the like effect to the caveator, at or to the address stated in the caveat, to take proceedings in court on his caveat, unless before the expiration of the said period of sixty days the caveator takes proceedings in court by originating summons . . or otherwise to substantiate the title, estate, interest or lien claimed by his caveat, and a judge's order in such proceedings has been filed with the registrar continuing such caveat: provided that the court or judge may upon an ex parte application shorten the said period of sixty days to such period as he shall specify in such order, and a copy of such order shall be served or mailed with the notice in this section referred to.

[**90**: M. 1913, s. 150, *ante* p. 596.]

[**91**: M. 1913, s. 146, *ante* p. 596.]

92. In any proceedings in respect of a caveat the court or judge may order that the caveator give such undertaking or security as such court or judge may consider sufficient, to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, or to answer the costs of the caveatee, and may direct the registrar to delay registering any instrument dealing with the land, mortgage or incumbrance during such time as the order of such court or judge provides, or may direct the caveator to take further proceedings by action or otherwise upon his caveat, or may make such other order as may be just.

93. In any proceedings taken in consequence of the filing of a caveat, if it be made to appear to the court or judge that the caveator, or person on whose behalf the caveat has been filed by the registrar as hereinafter provided, claims an interest in the land, mortgage or incumbrance by virtue of any contract in writing for the sale and purchase of such land, mortgage, or incumbrance, signed by the vendor thereof or by his lawfully authorized agent, or by virtue of an assignment of such contract, duly attested in the manner provided for in sections 102 and 103 of this Act, and there has been no default under the terms of such contract, or if any default has been made that such default has been cured before the return of the application to the court or judge, then the court or judge may, and unless it otherwise appears to be a case in which the caveat should be removed shall, refuse to order the removal of such caveat.

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[**94**: Sas. 1917, s. 139, *ante* p. 631.]

[**95**: B. C. 1911, s. 67A, *ante* p. 564.]

[**96-98**: M. 1913, ss. 149, 151, 153, *ante* p. 596.]

[**99**: Sas. 1917, s. 138 (1), *ante* p. 631.]

[**100**: Sas. 1917, s. 131, *ante* p. 630.]

101. (1) Any contract in writing for the sale and purchase of any land, mortgage or incumbrance shall, notwithstanding anything to the contrary therein contained, be assignable, and any assignment of any such contract shall operate according to its terms to transfer to the assignee therein mentioned all the right, title and interest of the assignor both at law and in equity, subject to the conditions and stipulations in such assignment contained: provided however that nothing herein contained shall affect any rights at law or in equity of the original vendor or owner of the land, mortgage or incumbrance until notice in writing of such assignment has been either sent to him by registered mail or served upon him in the way process is usually served; and the notice mentioned in section 86 hereof shall be deemed to be such notice.

Attestation of instruments.

102. [(1): Sas. 1917, s. 56, *ante* p. 609.]

(2) Any document executed by a corporation, notwithstanding anything to the contrary in the Act, statute, charter or memorandum of association incorporating such corporation, shall for the purposes of this Act be deemed to be sufficiently executed, if sealed with the corporate seal of such corporation and countersigned by at least one officer of the corporation.

[**103.** Sas. 1917, s. 57 (1), *ante* p. 610]: provided that the court or a judge may, upon being satisfied of the due execution of any instrument, whether such instrument has been executed within or without the limits of the province, authorize the registration of the same, notwithstanding that the proof of such execution may be defective under the provisions of this or of the next preceding section hereof.

Remedial proceedings. Ejectment.

[**104**: Sas. 1917, s. 159, *ante* p. 637. Omit cl. (*g*) in sub-s. 1.]

105. After a certificate of title has been granted therefor, any person deprived of any land in consequence of fraud, or by the registration of any other person as owner of such land, or in consequence of any fraud, error, omission, or misdescription in any certificate of title or in any memorandum thereon or upon the duplicate thereof, may in any case in which the land has been included in two or more grants from the Crown bring and prosecute an action at law for the recovery of damages against such person as a judge appoints, and in any other case against the person upon whose application the erroneous registration was made, or who acquired title to the land in question through such fraud, error, omission or misdescription: provided always that, except in the case of fraud or error occasioned by any omission, misrepresentation or misdescription in the application of

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such person to be registered as owner of such land, or in any instrument executed by him, such person shall, upon a transfer of such land bonâ fide for value, cease to be liable for the payment of any damages which but for the transfer might have been recovered from him under the provisions hereinbefore contained, and such damages with costs may in such last mentioned case be recovered out of the assurance fund hereinafter provided for, by action against the registrar as nominal defendant.

[**105A.** Any person bonâ fide taking a mortgage, incumbrance, or transfer which is void against a wife under the Dower Act may recover amount of loss from the assurance fund. Provincial treasurer may recover from a transferor, mortgagor, or incumbrancer all moneys paid out of assurance fund, and his right of action shall not be subject to any time limit.]

106. Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to action of ejectment, or to deprivation of land in respect to which he is registered as owner, any purchaser or mortgagee bona fide for valuable consideration of land under this Act, on the plea that his transferor or mortgagor has been registered as owner through fraud or error, or has derived title from or through a person registered as owner through fraud or error, except in the case of misdescription as mentioned in section 104.

[**107**: B. C. 1911, s. 125, *ante* p. 573.]

108. Any person sustaining loss or damage through any omission, mistake or misfeasance of the inspector of land titles offices, or a registrar, or any of his officers or clerks, in the execution of their respective duties under the provisions of this Act, and any person deprived of any land by the registration of any other person as owner thereof, or by any error, omission or misdescription in any certificate of title, or in any memorandum upon the same, or upon the duplicate certificate thereof, and who by the provisions of this Act is barred from bringing an action of ejectment or other action for the recovery of the land, may in any case in which remedy by action for recovery of damages hereinbefore provided is barred, bring an action against the registrar as nominal defendant for recovery of damages; and if the plaintiff recovers final judgment against such nominal defendant, the judge before whom such action is tried shall certify to the fact of such judgment and the amount of the damages and costs recovered, and the provincial treasurer shall pay the amount thereof to the person entitled on production of an exemplification or certified copy of the judgment rendered and shall charge the same to the account of the said assurance fund: provided always that notice in writing of every such action, and the cause thereof, shall be served upon the attorney-general, and also upon the registrar, at least three calendar months before the commencement of such action.

[**109**: N. Z. 1915, s. 189, *ante* p. 505.]

110. No action for recovery of damages sustained through deprivation of land shall lie or be sustained against the registrar, or against the assurance fund aforesaid, unless the same is commenced within the period of six years from the date of such deprivation; provided nevertheless that any person under the disability of infancy, lunacy or unsoundness of mind may bring the action within six years from the

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date on which the disability ceased; and the plaintiff in the action within six years from the date on which such disability ceased, and the plaintiff in any such action at whatever time it is brought, and the plaintiff in any action for the recovery of land, shall be nonsuited in any case in which it appears to the satisfaction of the judge before whom such action is tried that the plaintiff, or the person through or under whom he claims title, had notice by personal service or otherwise was aware of such delay and wilfully or collusively omitted to lodge a caveat, or allowed the caveat to lapse.

(2)[1] The registrar before registering any transfer, lease, mortgage or incumbrance, when no consent is produced as required by the Dower Act, shall require an affidavit in form JJ in the schedule to this Act of the transferor, lessor, mortgagor or incumbrancer, that the land described in such instrument is not subject to the provisions of the Dower Act, or that he has no wife, supported by such other evidence by affidavit or otherwise as the registrar may prescribe: provided that if the said instrument is executed under a power of attorney, the party so executing the same may if he is acquainted with the facts make the said affidavit.

[**111**: V. 1915, s. 240, *ante* p. 453.]

[**111**A: Sas. 1917, s. 168, *ante* p. 637.]

. . .

[**114.** (1): V. 1915, s. 80, *ante* p. 414.

(2): B. C. 1911, s. 170A, *ante* p. 577, omitting reference to "thirty days' notice."]

[**115**: V. 1915, s. 81, *ante* p. 414.]

[**116**: M. 1913, s. 58, *ante* p. 584, omitting proviso.]

Assurance fund and fees.

. . . .

120. The assurance fund herein provided for shall be formed by the provincial treasurer from the amounts paid to and received by him for that purpose by and from the registrars, as hereinbefore provided. . .

[**121**: Sas. 1917, s. 170, clauses (*a-c*) *ante* p. 638.]

[**122**: Sas. 1917, s. 67, *ante* p. 612, adding: "Provided that no one certificate issued to any person under this section shall include or refer to a greater area than 640 acres of land."]

[**123**: Sas. 1917, s. 69, *ante* p. 613.]

124. (1) Any owner subdividing land for which a certificate of title has been granted, for the purpose of selling or conveying the same in allotments shall deposit with the registrar a plan in triplicate.

. . . . .

[(3): On. 1914, s. 110 (1), *ante* p. 541.]

. . . . . .

(6) No plan of subdivision of any incumbered land shall be registered, unless the same be approved and signed by the incumbrancee or incumbrancees, nor unless it is accompanied by a discharge of all incumbrances affecting the lands required to be reserved for public

[1] This sub-section is introduced by s. 40 (7) of the St. L. Am. Act 1917, and appears to be misplaced; it would be more appropriately added to a section like s. 50 (*ante* p. 647).

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purposes under the Public Works Act and the regulations made thereunder.

(7) No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until after the same has been duly registered . . this section shall not apply to any plan now in existence and approved by the minister.

(8) For every violation of the preceding sub-section the offender shall be guilty of an offence, and on summary conviction shall be liable to a fine of not less than $50 and not more than $100 and costs for each lot sold under agreement for sale or otherwise.

(8A) No party to any sale or agreement for sale shall be entitled in any civil action or proceeding to rely upon or plead the provisions of sub-section 7 of this section, if the plan of subdivision by reference to which such sale or agreement for sale was made was registered when such action or proceeding was commenced, or if pursuant to the arrangements between the parties it was the duty of the party who seeks to rely upon or plead the provisions of such sub-section to himself register such plan of subdivision, or cause the same to be registered.

. . . . . .

(9) Upon the filing of an original or amended or substituted plan of subdivision, the lands finally shewn to be reserved for public purposes, as required by the Public Works Act and the regulations made thereunder, shall vest in the Crown in the right of the province, and the registrar shall cancel the areas so shewn on such plan from the original and duplicate certificates of title, and he shall issue a certificate of title for such lands to the minister of public works representing his Majesty in right of the province, and forward the duplicate thereof to the said minister.

(10) Any certificate so forwarded to the minister of public works may with his written consent be cancelled or amended, or a new certificate substituted therefor, if the plan of subdivision under which it was issued is withdrawn, amended or displaced.

Road allowances.

. . . . . .

126. (1) Upon the filing in the land titles office of the plans of surveys of any road, as provided for in the Public Works Act, the lands shewn on such plans, so far as the same are not Dominion lands, shall vest in the Crown in the right of the province, subject to the right of any person who has acquired any interest in the said lands, so far as the same are taken for any road allowance, diversion or new road, to compensation for such interest.

(2) The Crown shall not be entitled to any mines or minerals, whether solid, liquid or gaseous, which may be found to exist within, upon or under any land vested in the Crown under the provisions of this section, unless the same are expressly purchased, and the title to any such mines or minerals shall in no wise be affected by the filing of any plans of survey as provided herein.

. . . . . .

[131: V. 1915, s. 176, *ante* p. 439.**]**

[132: V. 1915, s. 270, *ante* p. 460.**]**

. . . .

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135. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, mortgage, incumbrance or lease from, the owner of any land for which a certificate of title has been granted, shall be bound or concerned [&c., Sas. 1917, s. 194, *ante* p. 639.]

136. In any suit for specific performance brought by an owner of any land for which a certificate of title has been granted, against a person who has contracted to purchase the land, not having notice of any fraud or other circumstances which according to this Act would affect the right of the transferor, the duplicate certificate of title of the owner shall be evidence that the owner has a good and valid title to the land for the estate or interest therein mentioned or described.

[**137, 138**: Sas. 1917, ss. 195, 196, *ante* p. 639.]

[**139**: Sas. 1917, s. 205, *ante* p. 641.]

. . . .

[**143**: V. 1915, s. 243, *ante* p. 454.]

. . . .

[**145**: Sas. 1917, s. 209, *ante* p. 641.]

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SCHEDULE.

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NORTH-WEST TERRITORIES.

(DOMINION OF CANADA).

Land Titles Act (R. S. 1906, c. 110).

NOTE.—The registration statutes of the North-West Territories are Acts passed by the Dominion legislature. The Act of 1906 (amended slightly) is for the most part substantially identical with the Alberta 1906 Act as originally enacted; the order in which the sections stand is however different, and the sections of the Canada Act are more frequently broken up into sub-sections, the Canada Act in this respect having apparently served as the model for the present Saskatchewan 1917 Act. The most important point on which the Canada Act differs from that of Alberta (as now amended) relates to the remedies of a mortgagee; no statutory power of sale or right of foreclosure is conferred, and recourse must be had to the courts to enable a mortgagee to enforce his security. The sections and parts of sections here printed or referred to shew the material points as to which the Canada and Alberta statutes differ; some of these (ss. 4-16, and 79) relate to land in general, and are identical with enactments contained in an Alberta general statute—An Act respecting the Transfer and Descent of Land (1906, c. 19).

Descent of land.

5. Land in the Territories shall descend to the personal representatives of the deceased owner thereof in the same manner as personal estate, and be dealt with and distributed as personal estate.

6. Except such devises as are made by the testator to his personal representative, either in his representative capacity or for his own use, no devise shall be valid or effectual as against the personal representative of the testator, until the land affected thereby is transferred to the devisee thereof by the personal representative of the devisor.

7. (1) Any devise or limitation which heretofore would have created an estate tail shall transfer the absolute ownership, or the greatest estate that the devisor or transferor had in the land.

[(2): Sas. 1917, s. 198, *ante* p. 640.]

8. Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any land which she would if living have taken by purchase, gift, devise, or descent from any other person.

9. When an illegitimate child dies intestate without issue, the mother of such child shall inherit any land of which he was the owner at the time of his death.

10. If a wife has left her husband and has lived in adultery after leaving him, she shall take no part of the land of her husband.

11. If a husband has left his wife and has lived in adultery after leaving her, he shall take no part of her land.

12. No widow whose husband died on or after the 1st day of January 1887 shall be entitled to dower in the land of her deceased

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husband; but she shall have the same right in such land as if it were personal property.

13. No husband whose wife died on or after the 1st day of January 1887 shall be entitled to any estate by the curtesy in the land of his deceased wife; but he shall have the same right therein as a wife has in the personal property of her deceased husband.

Married women.

[14, 15: Sas. 1917, ss. 200, 201, *ante* p. 640.]

16. A married woman shall, in respect of land acquired by her on or after the 1st day of January, 1887, have all the rights and be subject to all the liabilities of a feme sole, and may in all respects deal with land as though she were unmarried.

. .

69. In every instrument transferring land for which a certificate of title has been granted subject to mortgage or incumbrance, there shall be implied the covenant by the transferee that the transferee will pay the principal money, interest [&c., M. 1913, s. 97, *ante* p. 588.]

70. After a certificate of title has been granted for any land, no instrument until registered under this Act shall, as against any bona fide transferee of the land under this Act, be effectual to pass any estate or interest in such land, except a leasehold interest not exceeding three years, or to render such land liable as security for the payment of money.

. . .

79. [(1): M. 1913, s. 88, *ante* p. 587.]

(2) The introduction of any words of limitation into any transfer or devise of any land shall have the like force and meaning as the same words of limitation would have if used by way of limitation of any personal estate.

96. (2) [mortgages before issue of Crown grant: evidence of right to mortgage may be required.]

97. (1) A mortgagor shall be entitled to the possession of the duplicate certificate after the registrar has entered thereon a memorandum of the mortgage, but upon the sale under the mortgage or foreclosure under this Act, he shall forthwith deliver it up to the registrar to be dealt with under this Act.

(2) The registrar shall if desired furnish to the mortgagee or his assignee a certified copy of the certificate of title.

. .

99. Proceedings to enforce payment of moneys secured by mortgage or incumbrance, or to enforce the observance of the covenants, agreements, stipulations or conditions contained in any mortgage or incumbrance, or for the sale of the lands mortgaged or incumbered, or to foreclose the estate, interest or claim of any person in or upon the land mortgaged or incumbered, as also proceedings to redeem or discharge any land from any such mortgage or incumbrance, shall be had and taken in the North-West Territories before a stipendiary magistrate, and in the Yukon Territory in the Territorial Court.

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111. [powers of attorney: official recognition of power in general use, or registered copies.]

. . . . . .

123A [1908]. (1) The bishop of any church, or any trustees for any church or any congregation of any church, holding land for the purposes of such church or congregation shall respectively, with regard to such land and any dealings therewith, be deemed to be a body corporate and politic; and land so held shall devolve respectively upon the successor in office of such bishop, or upon the successors in office of such trustees, duly appointed in manner by law or by such church or congregation prescribed.

(2) The facts necessary to shew due appointment of such successors in office may, for purposes of registration, be proved by statutory declaration.

(3) Such bishop or trustees, and their successors in office, shall hold such land upon the trusts and for the purposes to which it is legally applicable; but for the purposes of any registered dealings with such land he or they, as the case may be, shall be deemed to be the absolute and beneficial owner or owners thereof.

Executions.

124. [(1): Sas. 1917, s. 149 (1), *ante* p. 633.]

(2) No land shall be bound by any such writ until the receipt, by the registrar of the registration district in which the land is situated, of a copy thereof.

[(3-5): Sas. 1917, s. 149 (3-5), *ante* p. 633.]

. . . . . .

136. Unless proper proceedings in a court of competent jurisdiction have been taken to establish the caveator's title to the estate or interest specified in the caveat, and an injunction or order has been granted restraining the registrar from granting a certificate of title or otherwise dealing with the land, a caveat shall lapse after the expiration of twenty-one days from the service on the caveator or at his address for service, proved to the satisfaction of the registrar, of a notice that such caveat shall lapse; or, if no such notice is meanwhile served, then such caveat shall lapse after the expiration of three months from the receipt by the registrar of such caveat.

. . . . . .

143. [only differs from Al. 1906, s. 105, in omitting the distinction between the case where "land has been included in two or more grants from the Crown" and "any other case," the action in all cases lying "against the person upon whose application," &c.]

. . . . . .

166 . . **182.** [further express powers conferred upon "the judge" of prohibiting "improper dealings."]

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JAMAICA.

REGISTRATION OF TITLES LAW 1888

(Law 21 of 1888).

NOTE.—The principal statute is modelled on the Victorian Act of 1866, which was amended and reproduced in the Act of 1890 (printed in Aust. Torr. Syst. 497 *et seq.*), this again being amended and reproduced in the present Act of 1915, partly printed *ante* p. 402, *et seq.* The result is that a considerable number of sections in V. 1915 do not appear in the Jamaica statute. Amongst these are the enactments relating to sub-leases and the sub-lease register (ss. 139-144), applications under title acquired by possession since initial registration (ss. 87-104), demand mortgages (s. 147), many provisions relating to mortgages (ss. 166-174), vesting orders made by commissioner of titles (ss. 227, 228), search certificates and stay orders (ss. 196-200), survey and boundary provisions (ss. 201-214), some provisions as to indemnity for loss (ss. 251-253), statutory conditions of sale (s. 278). The Jamaica statutes being thus modelled closely on the Victorian, with these omissions, only such sections are here printed as differ materially from the present Victorian enactments. In printing the principal statute of 1888, amendments have been incorporated. Many amendments (some of small importance) have been made by the statutes of 1888 (Law 31) and 1889 (Law 20), and it has not been thought necessary always to indicate these.

[Preamble: V. 1890, Aust. Torr. Syst. 497.]

[1: Tas. 1862, s. 1, Aust. Torr. Syst. 418.]

J. 1889, s. 36. A married woman, who is registered as a "proprietor" within the meaning of the said Law [1888], shall for all the purposes of the said Law be deemed to be a feme sole.

2. In the construction of this Law, except when the subject matter or context, or the other provisions hereof, require a different construction:—

. . . . .

The word "patent" shall mean the deed of grant from the Crown of any unpatented lands in Jamaica, or any lands which having once been patented have been adjudged forfeited or escheated to the Crown, or of any lands sold pursuant to the provisions of section 87 of Law 43 of 1887.

. . . . . .

Procedure in bringing Land under the operation of this Law.

15. Land may be brought under the operation of this Law by the registrar registering the title of some person thereto as the proprietor thereof, in manner hereinafter provided.

16. The title of any person to land brought under the operation of this Law shall be registered either as an absolute or as a quallfied title.

17. A person registered under this Law as proprietor of any land with an absolute title shall be entitled to hold such land in fee simple,

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together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:—

(1) To the incumbrances (if any) entered on the certificate of title, and

(2) To such liabilities, rights, and interests as may, under the provisions of this Law, subsist over land brought under the operation of this Law without being entered on the certificate of title as incumbrances, but free from all other estates and interests whatsoever, including estates and interests of her Majesty, her heirs and successors, save only quit rents, land tax or other impost, charged generally on lands in this Island, that have accrued due since the land was brought under the operation of this Law.

18. A person registered under this Law as proprietor of any land with a qualified title shall be entitled to hold such land, except as against any person claiming any estate, right, or interest therein arising before a specified date, or under a specified instrument, or otherwise particularly described in the certificate of title; and the registration of a person with a qualified title shall have the same effect as the registration of such person with an absolute title, save that registration with a qualified title shall not affect or prejudice the enforcement of any estate, right, or interest appearing on the certificate of title to be excepted: provided always that a person registered as aforesaid with a qualified title may at any time thereafter apply to be registered with an absolute title, subject to all the provisions relating to an original application, save and except that only half the fees payable on any such original application shall be payable. And that it shall not be obligatory on the referee to cause the application to be advertised before directing the registrar to register such applicant with an absolute title.

J. 1889, s. 33. In all cases in which prior to the passing of the said Law [of 1888] a "patent" as defined in the said Law would have been the appropriate form of conveyance to any grantee of any lands, in lieu of such patent it shall be sufficient for the Governor to issue directions to the registrar to register the proposed grantee as the proprietor of the land to be granted to him, and the registrar shall thereupon, upon payment by the proposed grantee of the fee payable for a certificate of title, without reference to the referees or observance of any of the forms required to be observed in other cases, forthwith bring the land described in such requisition under the operation of the said Law, by registering the title of the person named in such requisition as the proprietor of the said land: provided always that the assurance fund under the said Law shall not be answerable in respect of any claim thereafter arising in reference to the said land, but the public treasury of the Island shall be liable in the same way and to the same extent as, in other cases under the said Law, the applicant or the said assurance fund would be liable.

Id. s. 34. Any patent heretofore made may, for the purpose of bringing land under the operation of the said Law, be deemed by the registrar or a referee sufficient evidence of the title of the grantee under any such patent to the land comprised in such patent, subject to any estate or interest appearing by such patent or subsequently created.

19. Any of the following persons may, by an application addressed to the registrar, in the form in the first schedule hereto, apply

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to have land brought under the operation of this Law (that is to say) —[V. 1915, s. 18, *ante* p. 404, omitting cl. vii (tenant for life) and final para. (deeds 20 years old, &c.).]

J. 1894, s. 1. When any contract shall have been made for the sale and purchase of any land, then unless the person agreeing to sell such land shall have stipulated to the contrary, it shall be lawful for the purchaser, at any time before the completion of the purchase, to require that the vendor shall, instead of making a conveyance of such land, cause him to be registered as proprietor of the land the subject of the contract under the provisions of the Registration of Titles Law 1888, with an absolute title in cases where the land has been agreed to be sold without any special conditions as to title, or with a title subject to such qualifications as may be in accord with the conditions under which the land was agreed to be sold: provided that nothing herein contained shall deprive any vendor of any right which may arise out of such contract for sale by reason of any rule of law or equity: provided also that the incidence of costs as provided for under the Conveyancing Law 1889 shall be in no way affected.

Id. s. 2. If the purchaser shall exercise the option hereby vested in him, the vendor shall furnish him with the information which he is, under the said Conveyancing Law, bound to furnish, and shall submit the draft application filled in with such particulars, and the purchaser shall at his own expense make all such searches and investigations into the title as are required to make the application complete.

Id. s. 3. The costs of the application form, the fees payable under the Registration of Titles Law, and stamp duty (if any), shall be deemed to be the vendor's costs within the meaning of section 2 of the Conveyancing Law 1889.

21. A person applying to have any land brought under the operation of this Law shall describe and identify the land in one or other of the following ways:—

1. By plat or diagram.
2. By metes and bounds.
3. By giving its reputed name, if he applies to be registered in respect of the whole land going by that name.
4. By giving its reputed name and, if he applies to be registered in respect of a part only of the whole land known by that name, saving and excepting either—(*a*) defined portions or (*b*) undefined portions.

J. 1910, s. 7. (i) Any person, entitled to sell land which shall have been registered otherwise than by plat or diagram, may apply to have such land registered by plat or diagram.

(ii) An application under this section shall in all respects be treated and dealt with as if it were an original application to register land. The duplicate certificate of title shall accompany the application, and the same shall be retained and cancelled by the registrar, and the original certificate of title shall also be cancelled by the registrar before the issue of a new certificate.

(iii) The referee when communicating any provisional approval of the registration of such title to the registrar shall, besides giving such directions as are required in the case of original applications, direct the registrar to cause notification of the application to be

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served on all persons, other than the applicant, who appear by the certificate of title to have any interest in the land.

22. The registrar shall submit such application, together with the deeds, documents, or other evidence as aforesaid, to one of the referees for his direction; and if the referee shall, on consideration of the deeds, documents or other evidence aforesaid, be of opinion that the applicant is a person entitled to make application under this Law, and that he is in possession by himself or a tenant of the land described or identified in the application, and that he would be entitled to maintain and defend such possession against any other person claiming the same or any part thereof, he shall provisionally approve the registration of the title of the applicant or his nominee as an absolute title to the land described or identified in the application.

If the referee shall be of opinion that the applicant is entitled to make application as aforesaid, and that he is in possession as aforesaid substantially of the land described or identified as aforesaid, and that he would be entitled to maintain and defend such possession as against any other person claiming the same or any part thereof, and that the land of which the applicant is in such possession as aforesaid, though the evidence is insufficient as to the description or identification thereof given in the application, is capable of being described or identified in one of the other ways in which it might have been described or identified in the application, he shall provisionally approve the registration of the title of the applicant or his nominee, as an absolute title to land described or identified in one of the other ways in which it might have been described or identified in the application.

In either of the two cases aforesaid, if the referee shall be of opinion as aforesaid, except that the applicant does not satisfy him that he would be entitled to maintain and defend his possession against any person whose estate, right, or interest might arise before a specified date or under a specified instrument, or might be otherwise particularly described, he shall provisionally approve the registration of the title of the applicant or his nominee as a qualified title to land as aforesaid, and shall specify the nature of the qualified title to land as aforesaid, and shall specify the nature of the qualification to which such title is to be subject.

23. It shall be no objection to the referee approving any title as aforesaid that the land is subject to any liabilities, rights, or interests which under the provisions of this Law need not be entered on the certificate of title as incumbrances, or that the land is subject to any incumbrance (not being a mortgage the owner whereof shall not have consented to the application) which may be specified in the certificate of title and continue outstanding.

. . . . . .

31 [Am. 1894, s. 4]. Upon registering a certificate of title, the registrar shall retain in his custody and possession all deeds, instruments, and documents evidencing the title of the person registered, and shall endorse upon the last of them, if there be more than one, a memorandum that the land included in the certificate has been brought under this Law, and shall sign such memorandum: provided always that if any such deeds, instruments, or documents relate to any property other than the land included in such certificate, the registrar shall cause such deed, document or instrument (if unrecorded) to be

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copied at the expense of the applicant, such copy to be retained by the registrar, and shall return such deed, instrument, or document to the person from whom he received the same, having first endorsed upon the same a memorandum signed by him to the effect that the land included in the certificate has been brought under the Law.

No person shall be entitled to inspection [V. 1915, s. 34, *ante* p. 407.]

J. 1889, s. 37 [1910, s. 8]. When any land shall be brought under the operation of the principal Law, the registrar shall in the case of all applications in which it appears that a deed or other document of title relating to the land is on record in the record office, forthwith notify the fact to the deputy keeper of the records, and shall furnish him with particulars of the recording of such deed or document with regard to each parcel, if more than one, or the last of such deeds, if more than one, and the deputy keeper of the records shall thereupon make a memorandum of such fact on the margin of the record of the last such deed or document, or deeds or documents.

. . .

Register book. Mode of registering, and effect of registration.

40. Land shall be brought under the operation of this Law by the registrar registering a certificate certifying, under his hand and the seal of the office, that a person therein named is the proprietor of the land therein described or identified, either with an absolute title, or with such qualified title as may have been directed and approved by the referee (as the case may be). Such a certificate (hereinafter called "certificate of title") shall be in duplicate [V. 1915. s. 47, *ante* p. 408.]

. . . . . .

50. Two or more persons may be registered under this Law as joint tenants, tenants in common, or coparceners of any land. In all cases where two or more persons are registered as tenants in common, or as coparceners, of any land, one certificate for the entirety, or separate certificates for the undivided shares, may be issued; but in the case of persons registered as joint tenants, one certificate only shall be issued.

. . . . . .

53. No certificate of title registered and granted under this Law shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts of law and equity as evidence of the particulars therein set forth, and of the entry thereof in the register book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of, or having any estate or interest in, or power to appoint or dispose of, the land therein described, is seised or possessed of such estate or interest, or has such power.

54. In any suit for specific performance [V. 1915, s. 71, *ante* p. 412] the certificate of title of such proprietor shall, if such proprietor is registered with an absolute title, be held to be conclusive evidence that such proprietor has a good and valid title to the land

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for the estate or interest therein mentioned or described, and shall in any such suit entitle such proprietor to a decree for the specific performance of such contract. And if such proprietor is registered with a qualified title, the certificate shall be conclusive evidence that he has a good and valid title, subject to the qualification therein set forth.

55. Notwithstanding the existence [V. 1915, s. 72, *ante* p. 413]: provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions, and powers (if any) contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Law under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit-rents or taxes, that have accrued due since the land was brought under the operation of this Law, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument.

. . . .

66. Whenever by a transfer, or by any other lawful mode, a portion only of the land comprised in any certificate of title passes to any person other than the registered proprietor thereof, the registrar, having duly registered the instrument under which such portion passes shall, on payment of the fee payable under the provisions of this Law, register the title of the person to whom such interest has passed in manner hereinbefore provided in the case of land being first brought under the operation of this Law; but when the whole of the land passes to any person other than as aforesaid, it shall not be incumbent on the registrar to make out a new certificate of title in the name of such person, but such person shall be deemed to be duly registered as proprietor of such land when a memorandum of the transfer or other legal mode as aforesaid shall have been registered under this Law: provided always that if the transferee desire it, the registrar shall cancel the certificate of title and the duplicate, and shall retain such duplicate, and issue a new certificate of title in the name of the transferee.

. . .

71. In every lease [V. 1915, s. 132, *ante* p. 426]—

1. That he or they will pay the rent reserved by the lease at the times therein mentioned, and all rates and taxes which may be payable by the occupier of such leased property during the continuance of the lease, unless otherwise specially provided.
2. That he or they will keep and yield up the leased property in good and tenantable repair, accidents and damages from storm and tempest, or other acts of God and the Queen's enemies, and reasonable wear and tear, excepted.

. . . .

76. Upon the bankruptcy of the proprietor of any lease [V. 1915, s. 137, *ante* p. 428; for "*insolvent*," &c., substitute "bankrupt," &c., and for "*21 days*" substitute "42 days."]

. . . . . .

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79. The proprietor of any land under the operation of this Law may mortgage the same to the trustees or trustee of any benefit building society, by signing a mortgage thereof in the form in the eleventh schedule of this Law.

[Under the Hurricane Loans Law 1903 (Law 47) loans from the Government may be secured by the borrower signing a prescribed form of receipt for the advance. By s. 8 these receipts "shall be in duplicate, ". . and one copy of such receipt shall be lodged with the registrar of titles, and he shall register the same as a mortgage . "]

. . .

[**81**: V. 1890, s. 116, Aust. Torr. Syst. 532. V. 1915, s. 148, is amended by V. 1916, s. 9, *ante* p. 430.]

. . . . .

[**84**: V. 1915, s. 151, *ante* p. 432.]

J. 1903, s. 1. (1) A mortgagee of land under the Registration of Titles Law 1888, while in possession thereof shall, as against all prior incumbrances (if any) and as against the mortgagor, have by virtue of this Law power to make from time to time any of the following leases:—

(i) An agricultural or occupation lease for any term not exceeding 21 years; and

(ii) A building lease for any term not exceeding 99 years.

. .

(5) Every such lease shall be registered, in the manner required by the Registration of Titles Law 1888 for the registration of instruments affecting lands under that Law, if wholly executed in Jamaica within 90 days of its execution, or if wholly or partly executed out of Jamaica within 12 months of its execution.

Id. s. 2. (1) A mortgagee of any land under the said law shall have power, whenever he shall be entitled to sell the mortgaged property or any part thereof, by writing under his hand to appoint a receiver of the income of the mortgaged property or any part thereof.

(2) The appointment shall be registered in manner hereinbefore provided before, or within 30 days of, its being acted upon.

. . . .

Id. s. 3. Conveyances or transfers of land under the Registration of Titles Law, executed under the authority of the Settled Land Law 1888 (Law 16 of 1888), need not be recorded in the record office, but shall be registered in manner hereinbefore provided.

85. Besides his other remedies, every mortgagee or annuitant for the time being, and every transferee of a mortgage or charge [V. 1915, s. 152, *ante* p. 432]: provided also that if there be more than one mortgage or charge on any land, the mortgagees or annuitants shall be entitled to exercise the remedy given by this section according to their priorities.

89, 90. In addition to and concurrently with the rights and powers conferred on mortgagees, and on transferees of mortgages by this Law, every mortgagee for the time being [V. 1915, ss. 156, 157, *ante* p. 433, omitting references to *"first"* mortgages, &c.]

[**91, 92**: V. 1915, ss. 158, 159, *ante* p. 434, omitting the words "*beyond* £25."]

. . . . . .

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100. Every covenant [V. 1915, s. 176, *ante* p. 439]: and where in any instrument there shall be more than one covenantor, such covenants as are by this Law declared to be implied in instruments of the like nature shall be construed to be several, as well as joint.

[**101**: V. 1890, s. 138, Aust. Torr. Syst. 540. V. 1915, s. 177, differs: *ante* p. 440.]

Bankruptcy.

103. When upon the bankruptcy of the proprietor of any land, lease, mortgage or charge, the estate or interest of such proprietor in such land, lease, mortgage, or charge vests in the trustee in bankruptcy, such trustee shall be entitled to be registered in respect of the same; and the registrar, upon the receipt of an office copy of the conditional or absolute order in bankruptcy against such proprietor, accompanied by an application in writing under the hand of the trustee to be registered in respect of any land, lease, mortgage, or charge of such bankrupt, therein described, shall enter in the register book, upon the folium constituted by the certificate of title of such land, a memorandum notifying such order in bankruptcy; and upon such entry being made the trustee shall become the transferee, and be deemed to be the proprietor of such land, lease, mortgage or charge, estate or interest, and shall hold the same subject to the equities upon and subject to which the bankrupt held the same; but for the purpose of any dealings therewith under the provisions of this Law such trustee shall be deemed to be the absolute proprietor thereof. If the trustee shall omit or neglect to make the application aforesaid, or to lodge a caveat under the general provision relating to caveats hereinafter contained, within seven days after the registrar shall have notified to him, by a letter delivered or registered, that application has been made for the registration of an instrument concerning property (to be in such notice described) standing in the register book in the name of the bankrupt, such instrument may be registered, and thereupon shall not be affected by the order of adjudication, either at law or in equity. If a caveat shall be lodged pursuant to such notice, the same shall be dealt with and be subject to the same provisions as other caveats, with this variation, that the fourteen days' notice required in general cases need not actually be given to the caveator, but shall be deemed to have been given on the day on which the caveat was lodged.

Miscellaneous.

104. The registrar, upon production of sufficient proof of the marriage of a female registered as a proprietor of any land, or of any lease, mortgage or charge, not appearing by the register book to be held for her separate use, accompanied by an application in writing signed by such female proprietor to have the fact of her marriage, with the name and addition of the husband, endorsed upon the certificate of title, shall make such endorsement; and thereupon the husband of such female proprietor shall acquire all such title, estate, and interest to and in such land, lease, mortgage or charge, as he would have acquired if this Law had not been passed, and shall be deemed to be registered in respect thereof, to all intents and purposes. Until such

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entry shall be made, such woman shall be deemed in law and in equity the sole and absolute proprietor of such land, lease, mortgage or charge, to all intents and purposes, as if she had remained unmarried.

105. Whenever the fact of any marriage, and the name of the husband, has been so endorsed as aforesaid, then upon the death of the husband in the lifetime of the wife, or upon the death of the wife leaving her husband entitled as tenant by the curtesy of land comprised in the certificate of title upon which the said endorsement has been made, and in any case upon the death of any person registered with any other person as joint proprietor of any mortgage owned on a joint account in equity, the registrar, on the application of the widow, husband, or person entitled by survivorship as aforesaid, and proof to his satisfaction of such events as aforesaid, may register such applicant as the proprietor thereof, and she or he shall, upon being registered in the manner herein prescribed for the registration of a like estate or interest, become the transferee of such land, mortgage or charge, and be deemed the proprietor thereof, but as regards any tenancy by the curtesy for the lifetime only of such husband.

. . . . . .

[109: W. A. 1893, s. 124, Aust. Torr. Syst. 629, as originally enacted.**]**

Powers of attorney.

110. The proprietor (including a married woman) of any land under the operation of this Law, or of any lease, mortgage or charge, may appoint any person to act for him in transferring the same, or otherwise dealing therewith, by signing a power of attorney in the form or to the effect in the first schedule hereunder [1889]. Every such power, or a duplicate or attested copy thereof, shall be deposited with the registrar, who shall note the effect thereof in a book to be kept for the purpose.

. . . .

Attestation of instruments.

112. Instruments and powers of attorney under this Law signed by any person and attested by one witness shall be held to be duly executed; and such witness may be—

(Within this Island)—the Governor, or any of the judges of the Supreme Court, or any justice of the peace, or the registrar under this Law, or a notary public, or a solicitor of the Supreme Court.

(In Great Britain or Ireland)—the mayor or deputy mayor, or other chief magistrate or deputy chief magistrate, of any city, borough or town corporate, or a notary public.

(In any of the dominions, territories, colonies, dependencies or possessions of the Crown of Great Britain and Ireland)—the Governor or person exercising the functions of Governor, the commander in chief, a judge of any court, the mayor or chief magistrate of any city or town, or a notary public.

(In any foreign state or country)—the British consular officer (which expression shall include consul-general, consul and vice-consul, and any person for the time being

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discharging the duties of consul-general, consul or vice-consul,) or a notary public: provided that where any such instrument or power of attorney purports to have been witnessed or certified by any notary public in any foreign state or country, there shall be annexed to such instrument or power of attorney a certificate, under the hand and seal of the British consular officer exercising his functions in such foreign state or country, to the effect that the person by whom such instrument or power of attorney has been witnessed or certified is a notary public duly commissioned and practising in such foreign state or country, or some portion thereof, and that full faith and credit can be given to his acts.

Such witness, whether within or without this Island, may also be any other person, but in such case he shall appear before one of the officers or persons aforesaid who, after making due enquiries of such witness, shall endorse upon the instrument or power a certificate in the form in the second schedule hereunder [1889], and such certificate shall be deemed sufficient proof of the due execution of such instrument or power, subject to the proviso hereinbefore contained as to any such instrument or power of attorney witnessed or certified by a notary public in any foreign state or country.

Where an instrument or power of attorney shall be witnessed or certified out of this Island by any of the officers aforesaid, the seal of office of such officer shall be affixed to his attestation or certificate on such instrument or power of attorney.

[**114**: V. 1890, s. 145, Aust. Torr. Syst. 543. V. 1915, s. 184. has been amended: *ante* p. 442.]

115. In every case in which, prior to a person becoming a registered proprietor of any land, lease, mortgage or charge under this Law, an order of sequestration of his estate, or an adjudication in bankruptcy shall have been or shall hereafter be made, and any instrument affecting such land, lease, mortgage, or charge is presented for registration, the registrar shall forthwith notify to the trustee of such estate, by a letter delivered or registered (in which shall be mentioned the bankrupt's name), that application has been made for the registration of such instrument; and unless a caveat forbidding such registration shall be lodged within seven days after the service or posting of such letter, such instrument may be registered [&c., s. 103, *ante* p. 672.]

116 [1910, s. 6]. So long as any caveat shall remain in force, prohibiting any registration or dealing with the estate or interest in respect to which such caveat may be lodged, the registrar shall not enter in the register book any change in the proprietorship, or any transfer or other instrument presented for registration subsequent to the date on which such caveat was lodged, purporting to transfer or otherwise deal with or affect the estate or interest in respect to which such caveat may be lodged, or issue any registration abstract.

[**143**: V. 1915, s. 241, *ante* p. 453, omitting reference to "*two or more grants from the Crown.*"]

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TRINIDAD AND TOBAGO.

REAL PROPERTY ORDINANCE

(*Laws 1902, No. 60*).

NOTE.—The principal statute (a revision of one passed in 1889) is modelled on the original New South Wales statute (now reproduced in N. S. W. 1900), with a few provisions from the statutes of other jurisdictions, and some differing altogether from other statutes; the sections do not, however, always stand in the same order as in the present New South Wales statute. Amendments have been incorporated in or printed with the sections of the principal statute, and (for the most part) only those sections are here printed or referred to which differ from, or are not contained in, the New South Wales statute. The chief points of difference relate to the remedies of mortgagees and the provision for transmission on death. No provision is made for registration overriding the rights of persons in adverse possession, s. 45 of the New South Wales statute not being adopted. The N. S. W. 1900 is printed in Aust. Torr. Syst. 88 *et seq.*

An Ordinance relating to the registration of titles to land.

. . . . .

[Interpretation clause, substantially as in N. S. W. 1900, s. 3, except the following ("incumbrancee" being omitted altogether.]

. . . . . .

"Incumbrance" means any charge on land created for the purpose of securing the payment of an annuity or sum of money, and any matter not a transfer of which a memorandum has been endorsed as such, or an entry made in the register book.

"Incumbrancer" means the person in whose favour an incumbrance subsists.

. . .

[**10, 11**: N. S. W. 1900, s. 14, adding at end of s. 11]: provided that no application shall be entertained in respect of any land which is in adverse occupation.

. . . . . .

[**13.** Every such application shall be accompanied by a map of the land therein referred to, prepared and certified in accordance with the prescribed provisions.

14. Upon the receipt of such application by the registrar-general the title of the applicant shall be examined and reported upon by the examiner, and the case shall thereupon be referred to a judge for his consideration [N. S. W. 1900, s. 17.]

15. Any report made by an examiner to a judge shall be privileged, and shall not be liable to inspection or production.

16. Where the applicant is not the original grantee from the Crown, if it shall appear to the satisfaction of a judge that the land [N. S. W. 1900, s. 18.]

17. If it shall appear to the satisfaction of a judge that any parties interested [N. S. W. 1900, s. 18.]

18. When any land is brought under this Ordinance in pursuance of an order made under either of the last two preceding sections, the

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registrar-general shall make an entry in the index of deeds, under the names of the persons on whose application such order was made, and such entry shall, for all purposes for which the registration of a deed is notice, be deemed to be notice that the land has been brought under the provisions of this Ordinance.

. . . . .

[**20**: V. 1915, s. 23, *ante* p. 405.]

. . . . .

26. [N. S. W. 1900, s. 26, substituting "one calendar month" for "three months," and adding]: provided that if in such proceedings such person [caveator] shall prove that he is in possession of such land, nothing in this Ordinance contained shall enable the applicant to recover possession thereof, or to have such land brought under this Ordinance, without previously establishing his own title thereto.

. . . . .

46. [N. S. W. 1900, s. 41, adding at end], or may refuse to register either instrument until an order determining the relative rights of the several claimants shall have been made by the court or a judge.

. . . . .

48. Notwithstanding anything herein contained, the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any) contained in the deed by which the said land was originally granted by the Crown, pursuant to the regulations in force at the time respecting the sale and disposal of the waste lands of the Crown in this colony, and subject to any resumptions which may have been made of the said land or any part thereof in pursuance of such reservations of right as aforesaid, and to any taking of the said land or any part thereof that may have been effected pursuant to the provisions of any Ordinance authorizing his Majesty, or any person on behalf of his Majesty, his heirs and successors, to take the same, and subject also to any public rights of way, and to any unpaid public land charge, rates, taxes and assessments and succession duty, notwithstanding the same respectively may not be specially notified as incumbrances on such certificate or instrument.

49. The registrar-general shall not register under this Ordinance any instrument, purporting to transfer or otherwise deal with or affect any estate or interest in land under the provisions of this Ordinance, except in the manner herein provided; nor unless such instrument be in accordance with the provisions hereof: provided that for the purposes of this section a warrant of forfeiture under the Land Charges and Land Taxes Ordinance shall not be deemed to be an instrument as aforesaid.

56. On a transfer of leasehold property for the whole of the interest of the transferor in the whole of the land comprised in the grant or certificate relating thereto, such grant or certificate and the corresponding entry in the register book shall not be cancelled, but shall be endorsed with a memorial of such transfer and shall be delivered to the transferee. If a part only of the transferor's interest in such land, or his interest in a part only of such land be transferred, or if an easement thereof be created, such dealings shall be evidenced by memorials endorsed on the proper certificates of title, so far as possible in the manner directed in the case of freehold property, and the

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registrar-general shall have all the powers necessary for or incidental to the purpose.

[**57**: N. S. W. 1900, s. 48 (2), inserting: "and every grant or certificate with such memorandum shall be as effectual for the purpose of evidencing title and for all other purposes as if the old grant or certificate had been cancelled and a new certificate had been issued to the transferee in his own name."]

. . . .

66. A married woman, being a registered proprietor of land, shall be deemed to be entitled thereto for her sole and separate use, and for the purposes of this Ordinance a married woman may deal with land under this Ordinance, and may execute and sign all deeds and instruments and do all personal acts, without the concurrence of her husband, as effectually as if she were a *feme sole*, and without any separate examination or acknowledgment.

PART V. *Leases.*

67. When any land under the provisions of this Ordinance is intended to be leased or demised for a life or lives, or for any term of years exceeding three years, the proprietor shall, and if any such land is intended to be leased for a period of less than three years the proprietor may, with the consent of the intending lessee, execute a memorandum of lease. . . and every such instrument shall for description of the land intended to be dealt with refer to the grant or certificate of title of the land, or shall give such other description as may be necessary to identify such land: provided that a right for or covenant by the lessee to purchase the land therein described may be provided in such instrument, and in such case if the lessee shall pay the purchase-money stipulated and otherwise observe his covenants expressed and implied in such instrument, the lessor shall be bound to execute a memorandum of transfer to such lessee of the said land. Save as provided by the Conveyancing Ordinance, no lease of mortgaged or incumbered land shall be valid and binding against the mortgagee or incumbrancer, unless such mortgagee or incumbrancer shall have consented to such lease prior to the same being registered, and a note of such consent shall have been entered in the register book.

68. On presentation of any memorandum of lease drawn, executed, and proved in accordance with the provisions of this Ordinance, the registrar-general shall register such lease; and no lease unless registered shall be valid against any registered transferee, mortgagee, incumbrancer or lessee.

69. When such lease is presented for registration, a memorial thereof shall be endorsed, as an incumbrance, on the certificate of title and on the proper page in the register book: provided that any registered lease may be extended in manner hereinafter mentioned.

. . . .

PART VI. *Mortgages and incumbrances.*

[**74**: V. 1915, s. 145, *ante* p. 430.]

75. Subject to the provisions in this Ordinance contained, every mortgagee or incumbrancer under this Ordinance shall, when his mortgage or incumbrance is registered, have all the rights and powers, and be subject to all the limitations and provisions, which he would

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have enjoyed or been subject to under the law for the time being in force, if the land comprised in the mortgage had not been subject to this Ordinance, and he were a mortgagee or incumbrancer under an instrument purporting to convey the legal estate, and duly executed, attested and registered, and containing, in addition to all implied provisions and conditions, all the special covenants, provisions, and conditions contained in the instrument of mortgage or incumbrance registered under this Ordinance as aforesaid.

76. As between different mortgages and incumbrances, priorities shall be determined by the relative priority in time of the entries relating thereto in the register book.

77. No transfer by a mortgagee on a sale under any statutory power of sale shall be registered, unless the instrument of transfer shall refer to the power under which it is made, and if such transfer be made in professed exercise of the power of sale conferred by the Conveyancing Ordinance, it shall be lawful for the registrar-general, unless he see reason to the contrary, to register such transfer without evidence that such power has been duly and properly exercised.

78. On the registration of a final order for foreclosure, the registrar-general may issue a certificate of title to the mortgagee, and may call in the certificate of title of the mortgagor for complete or partial cancellation as the case may be. After the issue of such certificate such foreclosure may not be re-opened as against any subsequent transferee, mortgagee or incumbrancer.

[**79**: N. S. W. 1900, s. 81, short covenants to insure, not to use as a shop, not to carry on offensive trade, not to assign, not to cut timber. In the covenant to insure, the insurance money "shall at the option of the mortgagee be applied either in or towards satisfaction of the moneys secured by the mortgage or in making good the loss or damage in respect of which the money is received."]

[**80**: V. 1915, s. 163, *ante* p. 436.]

[**81**: W. A. 1893, s. 124, as originally enacted, Aust. Torr. Syst. 629.]

82. Upon proof to the satisfaction of the judge of the death [V. 1915, s. 164, *ante* p. 436.]

[**83, 84**: V. 1915, ss. 166, 167, *ante* p. 437.]

. . . .

86. Dower or its extinction may be registered in like manner and on payment of like fees as incumbrances, but dower shall not be deemed to be an incumbrance.

PART VII. *Powers of attorney and registration abstract.*

87. The registered proprietor of any land, estate, or interest under the provisions of this Ordinance may, whether he be a trustee or not, authorize and appoint any person to act for him or on his behalf, in respect to the transfer or other dealings with such land, estate or interest in accordance with the provisions of this Ordinance, by executing a power in any form heretofore in use for the like purpose, or in form K of schedule I hereto, and such power of attorney shall either be registered in the registry of deeds, or a duplicate or certified copy thereof shall be filed in the office of the registrar-general, who shall on payment of the prescribed fee enter in the register book a memorial of

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the particulars therein contained, and the date and hour when it was registered or filed: provided that the registrar-general shall not be bound to enter any such memorial of any power of attorney drawn otherwise than in the said form in the said schedule, unless he be requested in writing so to do, and the proper reference to the page or pages in the register book referring to the lands, the dealing with which is authorized by such power, be furnished to him: provided also that no power of attorney shall be deemed to authorize any dealing under this Ordinance, until such memorandum has been entered as aforesaid.

. .

PART VIII. *Judgments, lites pendentes, execution and forfeiture.*

92. When any memorandum of judgment under the Remedies of Creditors Ordinance, or of lis pendens, shall have been registered as against any person, the registrar-general shall endorse a caveat on each page of the register book relating to land of which he is the registered proprietor, and upon the endorsement of such caveat the charge (if any) therein referred to shall remain in force for three years, unless such caveat shall be previously withdrawn or removed by order of a judge: provided that on re-registration of such memorandum of judgment or lis pendens, such caveat shall also be renewed: provided also that when any such caveat as aforesaid shall be entered in the register book, the registrar-general shall make the corresponding entry on the duplicate certificate of title when produced to him, and he may require any such certificate of title to be delivered up to him for such purpose.

[**93**: N. S. W. 1900, s. 105 (1)-(4), (6), "subject to the provisions hereinbefore contained respecting memoranda of judgments.]

Tr. 1914, s. 4. Where land registered under the provisions of the Real Property Ordinance (No. 60) is sold by an officer in the public service under the provisions of any Ordinance, or by any public authority under the provisions of the Public Authorities (Rates and Charges Recovery) Ordinance 1913, such officer or the chairman of such authority, as the case may be, shall unless a mode of transfer is otherwise provided for, execute a transfer to the purchaser of the land sold, and such transfer shall be expressed to be made by such officer or chairman in his official or public capacity, and by virtue of the Ordinance empowering and authorizing him as aforesaid.

94. The registrar-general shall, on receiving from the sub-intendant of Crown lands a warrant of forfeiture, or a duplicate or certified copy thereof, of any land under this Ordinance, containing the proper reference to the entry in the register book, relating to such land, enter a memorandum of such forfeiture in the register book, and shall cancel the grant or certificate of title contained in the register book so far as it relates to the land, estate, or interest forfeited, and may require the registered proprietor to deliver up for similar cancellation, as herein provided, the duplicate grant or certificate of title: provided . . . (3) That notwithstanding anything contained in the Land Charges and Land Taxes Ordinance, no land under the operation of this Ordinance shall be deemed to be forfeited, unless the warrants of forfeiture relating thereto shall contain the proper refer-

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ence to the entry in the register book relating thereto, or until such cancellation in the register book as is hereinbefore directed shall have been made.

(4) That any acquittance given by the sub-intendant of Crown lands under the said Land Charges and Land Taxes Ordinance shall, if it relates to any land under this Ordinance, be notified by him to the registrar-general, with the proper reference in each case to the entry relating thereto in the register book; and the registrar-general shall on receipt of such notification make a memorandum of such acquittance, and the reverting of the land thereby affected, in the register book, and also on the duplicate grant or certificate of title if delivered to him for the purpose; and such cancellation as aforesaid shall thereupon be deemed to be annulled.

Tr. 1914, s. 2. (1) In the case of land of any proprietor . . which is resumed by the Crown the sub-intendant shall forward to the registrar-general the particulars of such resumption . (3) The amount of land so resumed . . shall be endorsed on the original Crown grant or certificate of title. .

95. All regrants under the said Land Charges and Land Taxes Ordinance, and all conveyances under the Casual Revenue Ordinance, relating to lands under the operation of this Ordinance, may be noted in the register book, and any such regrant or conveyance which relates only to land under this Ordinance may be registered in the register book instead of in the register of deeds; and it shall be the duty of the sub-intendant of Crown lands to note on every such regrant or conveyance the proper reference to the entry in the register book relating to the land comprised therein, if such reference shall have been brought to his knowledge.

PART IX. *Transmission on bankruptcy.*

97. Subject to the provisions of the Bankruptcy Ordinance and of any Ordinance amending the same and for the time being in force, and of this Ordinance, a trustee in bankruptcy may disclaim any land or interest therein which is subject to this Ordinance, and the registrar-general, on receiving such disclaimer in writing, duly signed and properly referring to the land or interest in question, and an office copy of the certificate of his appointment, may make an entry relating thereto in the register book, and the person entitled to any land or interest therein under this Ordinance, on the determination of the estate or interest of the bankrupt or the persons claiming under him, may thereupon apply to be registered in respect thereof; provided that if the property disclaimed shall be a lease subject to a mortgage, the mortgagee shall be entitled to be registered as proprietor of such lease, and no other applicant shall be registered as proprietor thereof except with such mortgagee's consent, or by the order of a judge.

Tr. 1914, s. 3. The committee of a lunatic so found by inquisition may be registered as the proprietor of any estate or interest in any land of which the lunatic is the registered proprietor, on payment of the prescribed fee, and on furnishing the registrar-general with such evidence as he may require.

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PART X. *Transmission on death.*

98 [Am. 1908, s. 3; 1916, s. 3]. On the death of a sole registered proprietor, or of the survivor of several registered proprietors of land, the personal representative or representatives of the sole proprietor or survivor shall alone be recognized by the registrar-general as having any right in respect of the land, and any registered dispositions by him or them shall have the same effect as if he or they were the registered proprietors of the land: provided that they may be registered as proprietors of such land on payment of the prescribed fee, and furnishing the registrar-general with such evidence as he may require:
it shall be lawful for the registrar-general to register the administrator-general a proprietor of any land forming part of any estate under £200 in value, of which he shall have taken possession under the powers conferred on him by the Administration of Property Ordinance 1913, without the production of probate or letters of administration.

99. Notwithstanding the preceding section hereof, where land of which a person is registered as limited proprietor passes to another person on the determination of the estate of that proprietor, the person to whom the land so passes may be entered in the register as proprietor of the land, and the registrar-general on his application, or on that of the trustees of the settlement (if any), and on production of such evidence as he may require, and in case the fee simple in the land shall not have been already brought under the provisions of this Ordinance, in accordance with the provisions of part II. hereof, shall register him as proprietor accordingly.

100. (1) On the death of the sole registered proprietor of any land it shall, notwithstanding any testamentary disposition, devolve to and become vested in his personal representative or representatives from time to time, as if it were a chattel real vesting in them or him.

(2) This section shall apply to any land over which a person executes by will a general power of appointment, as if it were land vested in him.

(3) Probate and letters of administration may be granted in respect of land only, although there is no personal estate.

[101: Eng. 1897, s. 2 (1), (2), Own. & Inc. 336.**]**

102. No land under this Ordinance shall be liable to any charge created by the will of a deceased registered proprietor, until a memorandum of such charge shall have been made by the registrar-general in the register book. No such memorandum shall be entered in the register book, until application has been made on that behalf and the prescribed fee paid, and such evidence as the registrar-general may require has been furnished that the land would, if not under the Ordinance, have been bound by such charge.

103. Nothing in this Ordinance contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts or legacies.

104-107. [Eng. 1897, s. 3, Own. & Inc. 336, 337, substituting "transfer" for "*conveyance*," and continue:] Such assent shall be retained by the registrar-general and registered: provided that if such personal representatives are not registered as proprietors of the land intended to be disposed of, the registrar-general may refuse to

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register such persons as so entitled, until the will of the deceased proprietor, or the letters of administration to his estate, or an office copy thereof, and any other evidence which he may require, have been supplied.

[**108**: N. S. W. 1900, s. 93.]

109. Nothing in this Ordinance shall render real estate liable to probate duty or legacy duty, or exempt real estate from succession duty.

PART XI. *Trusts.*

110. The registrar-general shall not make any entry in the register book of any notice of trusts, whether expressed, implied or constructive, but trusts may be declared by any instrument or deed, which instrument or deed may include [other lands, N. S. W. 1900, s. 82]; and such instrument may be registered in the register of deeds in accordance with the laws relating thereto, but such registration shall not be deemed to affect any purchaser from a registered proprietor with notice of any trust affecting land under this Ordinance.

111. If the registered proprietor of any land be a trustee, and the person beneficially entitled thereto would, if the land were not under the Ordinance, be entitled to require that the legal estate be vested in him, such beneficiary may take out a summons or commence an action to compel the registered proprietor to transfer the said land, and on the hearing of such summons or action an order may be made directing the registrar-general, on payment of the proper fee, to register such beneficiary as proprietor, and to issue to him a certificate of title.

PART XIII. *Instruments—their execution, correction, substitution, loss, &c.*

119A [1908, s. 2]. Every instrument signed by the registered proprietor, mortgagee, incumbrancer, or other person having any estate or interest in any land under this Ordinance, and attested by one witness at least (whose occupation or other description, and address or place of residence, shall be specified with reasonable certainty) shall be deemed to be duly executed within the meaning of this Ordinance; and every instrument so executed shall, when registered, have the force and effect of a deed made by the parties signing the same.

[**120, 121**: N. S. W. 1900, ss. 106, 107, concluding: ". at any foreign place, then before the British chargé d' affaires, consular officer, or notary public resident at such place."]

122 [1916, s. 2]. The execution of any such instrument may be proved before any such person as aforesaid, by the oath or statutory declaration of a witness attesting the signing thereof: provided that the registrar-general may refuse to register any instrument executed by a person signing his name in foreign characters, or by making his mark, unless the same bears upon it a certificate by a barrister, or conveyancer, or by a justice of the peace, or by a duly licensed interpreter, that he has explained, or caused to be explained, the true purport of such instrument to such person so signing as aforesaid, and that he is satisfied that such person understands the same.

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123 [1908, s. 5]. The registrar-general, notary public or other person before whom such witness shall prove such signature as aforesaid, shall endorse upon such instrument a certificate in the form in the schedule to the Real Property Ordinance 1908.

Tr. 1913, s. 2. No instrument of transfer or mortgage, or whereby any incumbrance is created, or mortgage is transferred, discharged or released, and no caveat, shall be registered . . unless it bears the signature of some barrister, or of some solicitor and conveyancer, as having prepared such instrument: provided always that the provisions of this section shall not apply to an instrument or caveat the execution whereof took place wholly out of the colony.

. . . . . .

[125: N. S. W. 1900, s. 111, inserting, after "may" and before "issue to such applicant," the words "on the order of a judge, to be obtained by the applicant on a summons."**]**

. . . . . .

PART XIV. *Indefeasibility of title and remedies of persons injured.*

[130: N. S. W. 1900, s. 43.**]**

. . . .

132. No action for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Ordinance, except in any of the following cases, that is to say:—

(1) The case of a lessor **[**N. S. W. 1900, s. 124, adding at end of section**]**: provided that nothing herein contained shall prevent a plaintiff from obtaining, in an action, judgment for specific performance of a contract for the sale or lease of land under this Ordinance; nor prevent a beneficiary, entitled to call for a transfer from a trustee, from obtaining a decree for such transfer or such vesting order as hereinbefore mentioned.

. . . . . .

[139: N. S. W. 1900, s. 130, substituting for sub-s. 2: ". . any person being under the disability of coverture, infancy or unsoundness of mind, may bring such action within six years from the date on which such disability shall have ceased: . in no case shall any such action be brought after twenty-seven years shall have elapsed from the accrual of such right of action."**]**

. . . . . .

141. The Crown or the assurance fund shall not **[**N. S. W. 1900, s. 133.**]**

. . . .

[Sched. 2 contains "Rules for the construction and certifying of plans," &c.

Sched. 4 contains some rules as to procedure on summons, and scale of fees chargeable by legal practitioners for conveyancing work.**]**

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LEEWARD ISLANDS.

TITLE BY REGISTRATION ACT 1886

(No. 1 of 1886—1914 Revision).

NOTE.—This statute is a consolidation or revision of the original statute (No. 2 of 1886) and amendments enacted from 1887 to 1914. In its drafting it differs from the statutes of all other jurisdictions, and no single section of any other such statute seems to have been reproduced exactly. In substance the statute does not differ greatly from the Australian statutes, and the system embodied in it resembles generally those set up in Australia and Canada. Transfers, caveats, production and rectification of instruments, &c., are provided for much as in an Australian jurisdiction (e.g. New South Wales or Victoria). Qualified and possessory title are provided for after the English model. The remedy of a mortgagee is by judicial sale only. No provision is made for short forms of covenants, little for implied covenants, and none for inserting additional clauses in instruments. The sections here printed are those which differ materially from enactments in other registration statutes; many less important sections, and some relating to details of procedure, have also been omitted.

. . . .

1. . (3) Whenever any of the expressions defined in schedule A occurs in this Act, it shall, unless the context otherwise requires, have the meaning assigned to it in the said schedule. . . (5) Whenever it is provided by this Act that an instrument shall be in a specified form, it shall be understood to mean that the instrument shall be in that form, or as near thereto as the circumstances admit.

PART I. *Indefeasible certificates of title.*

5. The date of every first certificate of title shall be the day and hour at which the registrar of titles shall place the certificate of title in the current volume; up to which period of time the former title shall be held to continue to exist, and immediately after to cease and determine, and all deeds upon which the land to which the certificate of title relates had been heretofore held, or by which any mortgages or incumbrances upon the said land were shown to exist, shall cease to have any force or effect, and shall be preserved in the custody of the registrar of titles, or in such manner as the chief justice, in his capacity of keeper of the public records, shall under the provisions of the Registration and Records Act 1881, from time to time direct.

6. (1) From and after the time when any land is brought under the operation of this Act, all dealings with such land shall be in the forms and governed by the principles set forth in this Act; and all such dealings shall take effect from the date and act of registration, and not from the date of the execution or delivery of any instrument or document, or otherwise, save as in this Act provided. It shall not be necessary to register under the provisions of the Registration and

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Records Act 1881, dealings with lands brought under the operation of this Act which are in accordance with the provisions of this Act.

(2) Dealings with lands brought under the operation of this Act, which are not in accordance with the provisions of this Act, shall operate as contracts only, and shall not confer any right in respect to the land, except the right of enforcing the contract as against the parties, and persons claiming, otherwise than as purchasers or mortgagees for value, under such parties.

7. Whenever a grant of land is made by the Crown, the grantee may elect, instead of receiving the grant, to have a certificate of title issued to him in lieu thereof, and on notice in writing of such election being given to the colonial secretary, or to the administrator or commissioner of the presidency in which the land is situate, the grant instead of being given to the grantee shall be delivered to the registrar of titles, with a direction endorsed on the grant and signed by the colonial secretary, or by the administrator or commissioner as the case may be, that a certificate of title be issued to the grantee. Whenever a Crown grant is so delivered to the registrar of titles, he shall without payment of further or other fees issue to the grantee a certificate of title in respect of the land comprised in the grant.

8. All certificates of title granted under this Act, and all notings of mortgages and incumbrances on the same, shall be indefeasible.

9. In every certificate of title a registered proprietor or proprietors shall be set forth of the land to which it relates, who shall have the absolute power to deal with the land in any manner in which land may be dealt with under this Act; any rights for life, or rights in the land for terms of years, or any other limited or conditional rights, being hereby declared to be incumbrances on the said lands, and requiring to be constituted as such in the manner in which incumbrances are constituted under the provisions of this Act.

10. The right of the registered proprietor, named in a certificate of title to the land comprised in a certificate of title granted under this Act, shall be the fullest and most unqualified right which can be held in land by any subject of the Crown under the law of England, and such right cannot be qualified or limited by any limitations or qualifications in the certificate of title itself, unless such limitations and qualifications were inserted in any Crown grant in place of which the certificate of title has been issued, or as in the case of mortgages and incumbrances, when these are noted on the certificate of title.

11. Notwithstanding anything hereinbefore contained, no certificate of title heretofore issued, or hereafter to be issued, under the provisions of this Act shall, save as provided in section 25 hereof, in any way affect any rights of common, rights of way, or rights to, or to be exercised over, any ponds, streams, or other water, or any other easements or profits à prendre, or the ownership of any public road.

PART II. *How lands under existing titles may be brought under this Act.*

12. Any owner of land not yet brought under the operation of this Act, who desires to have his title to the land made indefeasible according to the provisions of this Act, may present a request to the registrar of titles for the circuit in which the land is situate, for the

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issue to him of a certificate of title in respect of the land described in the request, provided that, where the owners are joint tenants, tenants in common, or coparceners, the request shall be presented by all. . .

13. The registrar of titles shall thereupon submit such titles, deeds and documents to a judge. . .

14. Where it has not been satisfactorily ascertained from the records and the deeds and documents presented that the person by whom a certificate of title has been requested is such owner, and such person has been in possession of the said land for the term of twelve years preceding the date of the request, then for the purposes of this Act, he shall be taken as the owner thereof, and the certificate of title shall issue to him accordingly. But such possession shall be a possession as owner, and not as an incumbrancer holding a life interest, or interest for a term of years, or other less estate.

17. Any person who claims to be the proprietor of any land, or to be interested in any mortgage or incumbrance, may enter a caveat in the office of the registrar of titles, either forbidding the issue of any certificate of title for any land to any specified person, or claiming that a note may be made upon any certificate of title in regard to any mortgage or incumbrance, or in any other manner stating an interest in any land, and such caveat shall be in form 2 in schedule B, and the caveator shall be heard before the certificate of title is issued, or the mortgage or incumbrance noted or rejected.

PART III. *Titles to land assurance fund.*

19. (1) Any person aggrieved by the issue of a certificate of title under this Act may, with the consent of the Governor, institute a suit as plaintiff against the attorney-general as defendant, claiming damages for the injury he may have sustained. Every such suit shall be governed by the provisions of the Crown Suits Act 1907, except that, if the plaintiff shall recover any damages, the same shall be paid out of the titles to land assurance fund.

(2) Where any person has, by wilful misrepresentation or otherwise, obtained a certificate of title to any land to be wrongfully issued, the registrar of titles shall call in the same to be cancelled, in any case in which the rights of a transferee or incumbrancee, who has taken bonâ fide for value without notice, will not be prejudiced thereby: and where damages have been recovered against the attorney-general in any such suit as in this section is mentioned, the attorney-general, on behalf of the general government of the colony, shall sue the person who has obtained the certificate of title for the issuing of which such damages have been recovered, for damages to be paid into the said fund: provided always, that if the person so sued has not obtained the said certificate by fraud, and can show that he has not been benefited by the issue of such certificate to the whole amount of the damages recovered against the Crown, he shall not be liable to a greater amount than that by which he has been so benefited: provided also, that no transferee or incumbrancee who has taken bonâ fide for value, without notice, subsequent to the issue of the first certificate of title, shall be liable in any action for damages.

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PART IV. *The transfer and transmission of land.*

20. When land has been brought under the provisions of this Act, the registered proprietor thereof, if he desires to transfer it to another on sale or otherwise, shall execute a memorandum of transfer in form 5 in schedule B, and such memorandum of transfer shall be presented to the registrar of titles.

24. Where any mortgages or incumbrances shall be noted on the certificate of title issued to a transferee, the covenant shall be implied that the transferee has accepted the land subject to such mortgages and incumbrances, and that he will pay the interest accruing thereon, and discharge the principal sums for which such mortgages and incumbrances have been granted, and indemnify the transferor from the payment of the same in all time to come.

. . .

26. (1) Where the registered proprietor of any land desires to transfer the same to trustees, he may register under the Registration and Records Act 1881 any deed or document constituting the trust, but he shall, of equal date therewith, present to the registrar of titles a transfer to the persons named as trustees, in the ordinary form of an absolute transfer to individuals, with the words "as trustees" added to their description, and also with the words "with survivorship," or the words "without survivorship," according as the trustees are to continue to act, or not to continue to act, on the death of one or more of their number, and the registrar of titles shall thereupon issue to the transferees a certificate of title without any reference to the trust deed, and they shall be the absolute registered proprietors of the said land, as regards the records of title, as fully and freely as any other registered proprietors: provided always, that any cestui que trust under the trust deed shall have the right to present a caveat to the registrar of titles to prevent any dealing with the land by the trustees in a manner inconsistent with the provisions of the trust deed.

(2) Where, in the deed of trust, trustees are named with the right in the survivor or survivors to act after the death of one or more of their number, the survivor or survivors may require the registrar of titles to issue to him or them a new certificate of title in his or their names as registered proprietor or proprietors of the land; and when the said trustees are nominated as such without right in the survivor or survivors to act, the cestui que trust, on the death of one or more of the said trustees, shall have the right to require the issue of a certificate of title to them as now the registered proprietors of the land. In like manner, where new trustees have been assumed in virtue of powers contained in a trust deed, or have been appointed by the court, they shall have the right to require the issue to them of a fresh certificate of title.

27. Whenever the registered proprietor of any land shall die, and shall leave any will disposing of such land, the land shall transmit to the devisee or devisees thereof, and the registrar of titles shall, upon a request being presented to him, accompanied by the probate of the will or an office copy thereof, issue to the devisee or devisees a certificate of title thereof, noting on the certificate of title of the deceased proprietor (the duplicate of which, in whose hands soever the same may be, shall be delivered up to him) the date of the will, the date of the death, and such references to the register of probate of wills as

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may enable the same to be readily found, and cancelling the certificate of title in favour of the deceased,—and the date of the title of the new registered proprietor shall be held to draw back to the date of the death of the former registered proprietor, whatever may be the date of presenting the will to the registrar of titles.

28. (1) Where the registered proprietor of land has died intestate, his heir may present a request to the registrar of titles for the issue of a new certificate of title in his favour, and the registrar of titles shall refer the matter to a judge, and if the judge shall be satisfied that the person applying is the true heir, the registrar of titles shall issue such new certificate of title accordingly, following, as near as circumstances will permit, the procedure prescribed in the last preceding section.

(2) Where the judge shall not be satisfied that the person applying is the true heir, he shall give such directions in regard to the trial of any question at issue, or such directions to the registrar of titles as to the issuing or refusing of such certificate of title to the heir or the person claiming to be heir, as may appear just.

29. When an administrator of estates shall be ordered under the Unrepresented Estates Act 1884 to sell any land brought under this Act, the administrator shall be entitled to demand from the registrar of titles the issue to him of a new certificate of title in which shall be added to his description the words "as administrator of estates," and the same procedure shall be followed, as nearly as circumstances will permit, as is hereinbefore prescribed in the case of transmission to devisees.

. . . .

31. Where a registered proprietor, incumbrancee, or mortgagee of any land has been adjudicated bankrupt, or where the estate of a registered proprietor, incumbrancee, or mortgagee has become the subject of liquidation by arrangement under the Bankruptcy Acts for the time being in force, the land, mortgage or incumbrance, as the case may be, shall transmit to the trustee of the estate, in the case of bankruptcy, as from the date of the order of adjudication, and in the case of liquidation by arrangement, as from the date of the appointment of the trustee of the estate; and the registrar of titles shall, upon the request of any such trustee as aforesaid, accompanied by the documents proving the facts, being presented to him, issue to the trustee a certificate of title in lieu of that in favour of the registered proprietor so adjudged bankrupt or whose estate is in liquidation, as the case may be, and the duplicate copy of the certificate of title in the hands of such registered proprietor shall be delivered up to be cancelled, and the same procedure shall be followed in the issue of the new certificate, as far as the circumstances will permit, as is hereinbefore prescribed in the case of transmission to devisees.

32. Where any person has become insolvent, and shall, either under the authority of the Court or voluntarily, assign the whole of his property to any assignee, administrator, or trustee on behalf of his creditors, any land of which he may be the registered proprietor shall transmit to the said assignee, administrator, or trustee; and such assignee, administrator, or trustee shall request a certificate of title to be issued in his name; and the registrar of titles, upon such request being presented to him with the deed or instrument of assignment, or

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such office copy thereof as he may consider sufficient, shall issue a new certificate of title to such assignee, administrator, or trustee in the manner hereinbefore provided, as nearly as circumstances will permit.

33. Whenever any mortgage or incumbrance shall transmit in any of the manners above set forth, the person in whose favour the same shall have transmitted shall be entitled to present to the registrar of titles a request, accompanied by the deed, document, or writing, or certificate of death upon which such request is founded, to alter the noting or marking of any mortgage or incumbrance upon any certificate of title, from the name of the previous mortgagee or incumbrancee to the name of such person as being then entitled to the mortgage or incumbrance; and the registrar of titles shall, in dealing with such request, proceed, as far as circumstances will permit, in the manner already herein provided in regard to transmissions of land, and shall make such noting or marking upon the certificate of title of such land (the duplicate of which in the hands of the registered proprietor, or any other person, he shall be entitled to call in and demand for the purposes of this section) as shall set forth the parties truly entitled to such mortgage or incumbrance, and shall cancel any former noting, and shall either re-issue the same certificate of title to the party entitled thereto, or a new certificate of title, as shall appear to the registrar of titles desirable and proper.

34. Where any person has acquired, or claims to have acquired, under the Real Property Limitation Act 1877, the ownership of land brought under the operation of this Act, he shall present a request to the registrar of titles to have a certificate of title issued to him in lieu of the registered proprietor in the original certificate of title, and the person who has acquired, or claims to have acquired, such ownership shall not be entitled to maintain any suit in regard to such land until he shall have obtained a certificate of title thereto. When a request for such a certificate of title is presented to the registrar of titles, he shall state a case to the Court, and shall not issue a certificate of title on such request until he has received the direction of the Court thereupon.

PART V. LAND TAX, MORTGAGES AND INCUMBRANCES; AND THE SALE OF INCUMBERED LAND.

Land tax.

35. (1) Land Tax now imposed, or hereafter to be imposed, by any Act or Ordinance of any presidency of this colony shall be a first charge on the land on which the said tax is made payable by the said Act or Ordinance, where such land is now held under, or is hereafter brought under, this Act.

(2) Such charge shall rank before all mortgages, incumbrances and interests already created and constituted, or hereafter to be created and constituted, by and under this Act, and the Government may take all such proceedings under this Act for the recovery of land tax now due and unpaid, or hereafter becoming due and unpaid, by sale or otherwise of the land or estate on which the said tax is so made

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payable, as a mortgagee or incumbrancee may now take under this Act when a mortgagor or incumbrancer has failed to perform the conditions of a mortgage or incumbrance, or as when a mortgagee or incumbrancee may lawfully demand the repayment of the sum lent on mortgage, or the amount or provision secured by an incumbrance.

(3) The registrar of titles shall make the following noting, as a first noting, on all certificates of title hereafter issued by him:—

'Charge in favour of the Government for land tax now due or hereafter becoming due."

(4) Every certificate of title heretofore issued by the registrar shall be deemed and taken to be noted with the noting in the last preceding section mentioned.

Mortgages.

36. A mortgage may be created and constituted over any land, by the noting of the same by the registrar of titles on the duplicate certificate of title, both that in the registry and that in the hands of the registered proprietor.

37. The warrant to authorize the registrar of titles to make any such note upon the certificate of title shall be a memorandum of mortgage in form 8 in schedule B, which shall be presented to the registrar of titles by the mortgagor or mortgagee, or by those authorized to act on their behalf. The duplicate certificate of title issued to the registered proprietor, or where the mortgage extends over lands contained in more than one certificate of title, then all the duplicates, must at the same time be handed to the registrar of titles to be noted.

38. The date of the mortgage shall be the date of presenting the memorandum of mortgage to the registrar of titles.

39. When a memorandum of mortgage has been presented, the registrar of titles shall proceed forthwith to note the chief facts set forth therein upon the duplicate certificates of title, according to the form of noting of mortgages upon the form of the certificate of title in schedule B.

[By the Hurricane Loan Title by Registration Act 1900, certain mortgages are to be effective, though not in statutory form, and others when registered are to constitute a first charge on the land.]

. . .

44. A mortgage cannot be created or constituted for any undetermined sum, but only for the sum expressly stated in the instrument, and actually advanced.

45. The specific sum lent upon the pledge of the land shall be payable at any date which may be fixed in the memorandum of mortgage, and if not repaid at that date, the mortgagee may, at any time thereafter, take steps for the sale of the land in manner hereinafter provided.

46. The mortgage shall be held to extend over the land contained in the certificate of title upon which it is noted, or any part of such land described in the memorandum of mortgage, and all rents thereof, and upon all fixtures on such land, and upon labourers' houses, mills, buildings, stables, cattle sheds, outhouses, and all erections used for estate purposes, whether fixtures or not, and upon all trees and shrubs, whether bearing fruit valuable in commerce or not, and upon all growing crops on the land belonging to the mortgagor,

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and all agricultural instruments, and appliances of sugar or other mills, and all stock belonging to the mortgagor, whether used for work and draught purposes, or grazing on the land, and over all contracts for labour to be performed on the land in favour of the mortgagor.

47. The mortgagor shall have the free use, enjoyment and management of all the property pledged, and it shall be his duty to care for the same, and keep all in workmanlike order and good condition, and for this purpose, to deal with all personal chattels accessory to the land, and to sell and replace stock as a good husbandman, but not to deteriorate the condition of the land, and to use his utmost skill in the profitable cultivation of the soil: and he shall have the right to raise temporary advances for crop purposes by pledging the crop, when cut or plucked for sale or manufacture, in the manner hereinafter provided.

48. The mortgagee cannot, as of right, on non-payment of principal or interest, and with or without notice, enter into the possession of the land with the view of working the same until the mortgage be paid off, but by consent of all parties interested the mortgagee can so enter subject to an accounting for the rents and profits of the land, as of land belonging, not to the mortgagee, but to the registered proprietor thereof.

49. The mortgagee shall not be entitled to the duplicate certificate of title as of right pertaining to him as mortgagee, but he shall be entitled to demand from the registrar of titles, at the cost of the mortgagor, a certified copy of the memorandum of mortgage, with a copy of the noting of the mortgage upon the certificate of title attached thereto. The duplicate certificate of title shall remain with the registered proprietor.

Incumbrances.

50. An incumbrance shall be created and constituted over and upon any land, in the same manner as a mortgage, by the noting thereof by the registrar of titles upon the certificate of title.

51. The warrant to authorize the registrar of titles so to note any certificate of title shall be a memorandum of incumbrance, which shall be in one of the forms numbered 9 in schedule B.

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55. An incumbrance which is not specially limited to a payment out of revenue, or other special form of incumbrance of a like nature, shall extend over the land contained in the certificate of title upon which it is noted, and upon all fixtures, houses, outhouses, growing crops, stock and other property over which a mortgage extends.

56. For the purposes of this Act, and in order that all the rights granted, which to any important extent affect the land, may appear upon the certificate of title, a lease for three years and upwards shall be deemed an incumbrance, and shall be constituted by a noting on the certificate of title in the same manner as an incumbrance.

57. The warrant to authorize the registrar of titles to make such a noting of a lease shall be a memorandum of lease in form 10 in schedule B.

58. No lessee shall be deemed an incumbrancee for the purpose of suing forth or prosecuting any sale of the land, in the manner provided in this Act for incumbrancees other than lessees, for any breach

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of the conditions of his lease, but be shall be left to his ordinary legal remedies.

Equitable mortgages.

59. An equitable mortgage may be constituted by deposit of the certificate of title, and when a duplicate certificate of title is so deposited to cover any liability incurred by the registered proprietor, the registrar of titles shall not require the holder thereof to deliver up the same for the purpose of noting thereon any mortgage or incumbrance subsequent to the said deposit, or for the purposes of any transfer. If the land shall transmit by the death of the registered proprietor while the equitable mortgage subsists, any new certificate of title which may be issued consequent thereupon shall be deposited with the equitable mortgagee in lieu of the certificate of title held by him.

60. An equitable mortgage shall be constituted and created over the land contained in the certificate of title deposited, and over all fixtures, houses, outhouses, growing crops, stock, and other property over which a mortgage extends; and shall rank in its order according to the date of presenting a caveat, as hereinafter provided, to the registrar of titles to prohibit dealings with the land while the equitable mortgage shall exist.

61. An equitable mortgage may be constituted by the deposit of the certificate of title, either for the repayment of a definite sum then advanced, if placed to the account of the borrower, or to cover advances to be made, or for the purpose of covering advances made or to be made, or liability for sums due.

62. The equitable mortgagee, if he desires to prevent any other creditor obtaining a preference over such effects comprised in his equitable mortgage as may be secured by bill of sale or otherwise, shall forthwith present a caveat, in manner hereinafter provided, to prevent any dealing with the land and the things accessory thereto, as already set forth, over which his equitable mortgage extends; but he may refrain from presenting such caveat, and in that case, his rights as regards the registered proprietor shall not be adversely affected thereby, but he will not have any preference over a more diligent creditor whose security may be meantime completed.

63. An equitable mortgage may be converted into a mortgage, with all the powers and privileges of a mortgagee against the registered proprietor by way of sale of the land and otherwise, by the equitable mortgagee obtaining the judgment of the Court fixing the amount due to him by the registered proprietor, or obtaining from the debtor a writing accepting a specific sum therein stated as being due by him to the creditor under the equitable mortgage. Whereupon the equitable mortgagee may present the judgment or the writing to the registrar of titles, and request him to note upon the certificate of title a mortgage in his favour for the amount of the judgment or accepted balance due, the date to draw back to the date of the caveat, which shall be removed and the noting of the mortgage put on the certificate of title in place thereof. The judgment or writing shall be filed as the authority to the registrar of titles for so acting. Where no caveat has been entered, the date of the mortgage shall be the date of presenting the judgment or writing to the registrar of titles.

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68. A lease for three years and upwards may be transferred by the execution of a memorandum of transfer in form 13 in schedule B, and the noting thereof by the registrar of titles on the certificate of title.

69. The date of the transfer shall be the date of the presentation of the instrument, and the duties of the registrar of titles, in regard to the instrument presented, shall in all respects be similar to those provided for in the case of the transfer of a mortgage or incumbrance.

70. Where a lease has come to an end by effluxion of time, or has been determined by consent or by the judgment of the Court, the registered proprietor may present a request to the registrar of titles to make such noting on the certificate of title as shall indicate the fact that the lease has ceased to exist, or to cancel the noting of the lease in such manner as the registrar of titles may deem shall best set forth the actual state of the facts in regard thereto.

Sale of incumbered lands or estates.

71. When a mortgagor or incumbrancer has failed to perform the conditions of the mortgage or incumbrance, or when the mortgagee or incumbrancee may lawfully demand the repayment of the sum lent on mortgage, or the amount or provision secured by the incumbrance, the mortgagee or incumbrancee shall serve, or cause to be served, upon the registered proprietor a formal notice to pay off in form 14 in schedule B, requiring him to perform the acts therein required within sixty days from the date of service. Where the registered proprietor is resident abroad, and there is no one in the colony holding his power of attorney, he shall be served in the manner in which a defendant out of the jurisdiction may be served under the Supreme Court Act 1913.

72. If the registered proprietor shall not within the time specified pay off the mortgage or incumbrance, or do the acts required of him in the notice to pay off, the mortgagee or incumbrancee may seize the land contained in the certificate of title on which the mortgage or incumbrance is noted, with the things accessory thereto as set forth and enumerated in this Act as falling within the mortgage or incumbrance.

73. The seizure shall be complete as regards the registered proprietor by the bailiff appearing on the premises with orders to seize, but, in evidence of his act, he shall place in the hands of the registered proprietor, or leave at his dwelling place, or if resident abroad in the hands of his attorney acting under his power of attorney, or if he has no such attorney, then the mortgagee or incumbrancee, in the manner in which a defendant out of the jurisdiction may be served under the Supreme Court Act 1913, shall serve the registered proprietor with an act of seizure, in form 15 in schedule B, in which shall be set forth, not only the land seized, but an inventory of the things accessory to the land over which the mortgage or incumbrance extends; but where the registered proprietor resides abroad, it shall not be necessary to delay proceedings because of such service.

74. The mortgagee or incumbrancee shall also forthwith present to the registrar of titles a caveat of seizure, in form 16 in schedule B, which the registrar of titles shall note upon the certificate of title in

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the same manner as is provided for other caveats, to prohibit all dealings with the land seized until the caveat be removed or withdrawn.

75. If the debt shall not be paid off or discharged, or the acts required in the notice to pay off shall not be performed, and no new arrangements shall be made within thirty days from the date of seizure, the mortgagee or incumbrancee shall lodge in the registry of the Supreme Court articles of sale, in form 17 in schedule B, of the said land, and the things accessory to the said land over which the mortgage or incumbrance extends, either in one lot or in more lots, as may be thought most likely to bring the highest price, and shall by summons call upon the registered proprietor, and all other mortgagees and incumbrancees, to appear before the Court on a day to be specified in the summons, being not less than three and not more than ten days after the date of the summons, to settle the said articles of sale, to estimate an upset price, to fix the day of sale, and to adjust the announcements of sale and the mode of publication thereof.

. . . .

77. In settling the articles of sale, the Court shall cause to be inserted therein, and in the announcements, provisions which shall reserve the rights of all persons holding estates for life or lesser estates which entitle such incumbrancees to the possession and enjoyment of the property, if their incumbrances shall be entitled to priority over the mortgagee or incumbrancee prosecuting the sale, unless the consent of such prior incumbrancees shall have been obtained to an unreserved sale; in which case the rights of the incumbrancee shall be valued and dealt with in the manner set forth in sections 53 and 54 hereof.

78. All lands so appointed to be sold shall be sold at the registry of the Supreme Court, or if rendered necessary by the number of bidders, in the court house itself, and the registrar of the Supreme Court shall preside at the sale, and shall take biddings for the lands; each bid being written down and signed by the bidder, and the highest bidder shall be accepted as the purchaser. When a higher bid has been made and accepted, the lower bids shall cease to be binding, even if the higher bidder fails to carry out the purchase.

. . .

82. The Court shall, at any time after payment of the price, and not later than the settling of the scheme of division, order and direct the registrar of titles to issue to the accepted purchaser a certificate of title to the land sold, free from any noting of the mortgages and incumbrances and caveat of seizure on the former certificate of title, except those incumbrances which have been reserved under section 77 hereof (the date of the new certificate of title to draw back to the day on which the offer was accepted), and to cancel the former certificate of title (the duplicate of which shall be delivered up to the registrar of titles by the former registered proprietor); and the land contained therein shall thereafter be held fully and completely freed and purged from the former mortgages and incumbrances, except those reserved as already provided for.

83. The registered proprietor, or his attorney or manager on the spot, shall, as a general rule, be named by the bailiff to take charge of the property seized, and during the necessary delay and until the land be sold, shall carry on the cultivation of the land, and the preparing and reaping of the crops, as before the seizure, but where, from the

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necessity of obtaining advances for the pay of labourers or otherwise, and the stoppage of his credit, the registered proprietor shall not be in a position to do so, then the mortgagee or incumbrancee who has made the seizure shall apply to the Court to appoint a receiver, to manage and carry on the land or estate until a sale be effected, or the seizure paid off.

. . . . . .

87. Any lease for less than three years of any portion of the land seized made after the seizure shall be ipso facto null, and no lease for three years or upwards can be registered in face of the caveat of seizure. All rents due for any portion of the land seized shall be paid, after seizure, into the registry of the Supreme Court.

. . . . .

93. The mortgagee or incumbrancee prosecuting the sale may bid, and all other mortgagees and incumbrancees; but the following persons are incapacitated from bidding or purchasing, either in their own persons or by means of a third party; viz., any judge of the Supreme Court, any registrar of the Supreme Court or any of his clerks, the solicitor having charge of the sale, and any person notoriously in insolvent circumstances. Any bidding or purchase made by or on behalf of any of the above persons shall be absolutely null and void.

. . . . . .

Crop advance warrants.

95. The security of the mortgagee and incumbrancee over the land, stock, growing crop, and other things accessory to the land, hereinbefore enumerated, shall not be held to extend over the crop when cut or plucked, but the mortgagor or incumbrancer shall deal therewith as a good husbandman to sell the crop to the best advantage, and shall, from the first and readiest of the moneys realized therefor, provide for the payment of the interest due, or to become due, on the mortgages and incumbrances for the year, and for payments constituting incumbrances.

96. The registered proprietor shall be at liberty to deal with the sugar, cocoa, coffee or other crop in order that it may be a pledge for the repayment of advances made for the purpose of providing the labour and supplies essential to the production of the crop, provided always that, up to the period of the crop ceasing to be a growing crop, the right of the mortgagee or incumbrancee, under his pledge of the land and estate, to seize and sell the land with the growing crop belonging to the registered proprietor, is preferable to all others.

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PART VI. JUDGMENTS.

106. (1) Where any registered proprietor, mortgagee or incumbrancee, or the estate or right of any registered proprietor, mortgagee or incumbrancee in or over any land brought under this Act, is liable to the payment of a judgment debt, the Court may, at any time after the date of the judgment, on the application of the judgment creditor, make an order for the sale of the estate or right of such registered proprietor, mortgagee or incumbrancee in or over the said land: provided that, if it is proved to the satisfaction of the Court that the

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estate or right in question is of the value of £500 or upwards, or where the application is for the sale of the estate or right of a registered proprietor, that, of the land in question, forty acres or more are under cultivation, no order of sale shall be made hereunder, except with the consent of such registered proprietor, mortgagee or incumbrancee, until the expiration of six months after the date of the application; and provided further that, on any such application, the Court instead of making an order of sale may order the amount due to be levied by the appointment of a receiver, or otherwise, as it shall think fit.

(2) In this section,—

"Judgment" means judgment entered in the Supreme Court: provided that any other judgment to which the provisions of section 8 of the Judgments Act 1907, apply, and in respect of which the provisions of the said section have been complied with, shall also be deemed a judgment within the meaning of this section; and

"Judgment creditor" means any person to whom any money, including money due for costs, is for the time being payable under any such judgment.

. . . . . .

109. (1) No judgment for the payment of any money or costs shall constitute such money or costs a charge upon the estate or right of any registered proprietor, mortgagee, or incumbrancee in or over any land brought under this Act, until an order for the levying of such money or costs, or some part thereof, by the sale of such estate or right, or otherwise, has been obtained and registered; and thereafter, the amount ordered to be levied shall be a charge on such estate or right, subject to charges having priority

(2) Where, after an order has been registered under this section, entry of satisfaction of the judgment is made, such entry shall be registered, and thereupon the order shall lapse.

110. After the expiration of three months from the date of registration of an order of sale, the order shall cease to be a charge upon the estate or right in question, unless such order shall have previously been put in force.

PART VII. CAVEATS.

111. A caveat shall, subject to the provisions of sections 17 and 74 of this Act, be in form 23 in schedule B, and shall be verified by the oath of the caveator, or his solicitor, or person acting under the power of attorney of the caveator, and shall contain an address within the colony at which notices may be served on the caveator.

112. Any person claiming to be entitled to stay the registration of any dealing in land, until his rights therein shall be recognized and registered, may present a caveat to the registrar of titles.

113. The registrar of titles shall register such caveat in the same form and manner as an incumbrance affecting the land set forth in the caveat, and the date of registration shall be the date of the presentation of such caveat, and for the purpose of such registration, the registrar of titles shall have the right to demand the duplicate certificate of title from the possessor thereof, in order that the caveat may be noted thereon as well as on the duplicate in the register.

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PART VIII. REGISTRATION AND CONFIRMATION OF QUALIFIED TITLES AND POSSESSORY TITLES.

Registration of qualified titles and possessory titles.

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127. The term "certificate of title" in the other parts of this Act shall include certificates of possessory title and certificates of qualified title; and all the enactments contained in the other parts of this Act with reference to certificates of title and any proceeding with reference to the same (save and except so much of section 5 which enacts that, immediately after the issue of a certificate of title, all deeds upon which the land to which the certificate of title relates has been theretofore held, or by which any mortgages or incumbrances upon the said land were shown to exist, shall cease to have any force or effect, and any provisions of any other parts of this Act which are inconsistent with the provisions of this part of this Act) shall, with such modifications as may be necessary, apply to certificates of possessory title and certificates of qualified title and all proceedings under this part of this Act: provided that no person in whose name a certificate of qualified title or a certicfiate of possessory title is issued, or who derives title from any such person, or from any noting on any such certificate, shall have, or shall by any dealing with the same confer, any greater right than by such certificate is given to the person in whose name the certificate is issued.

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Confirmation of possessory titles and qualified titles.

131. (1) Any person, in whose name as owner a certificate of possessory title or of qualified title has been issued, may apply to the registrar for the issuing of an indefeasible title under part II of this Act, or of a certificate of qualified title, after the expiration of five years from the date of the first publication of the notice in section 132 of this Act mentioned, unless due cause is shown in the meantime why such certificate should not be issued.

(2) The application for the issue of a certificate under this section shall be accompanied by an affidavit in such form, by such persons, and with such information as to title and other particulars, as may be prescribed, and shall include a statement to the effect that the deponent has made due enquiry into the title, is not aware of any question or dispute as to the title, except such (if any) as is specified in the affidavit, and believes that, except as aforesaid, the issue of the certificate applied for will not prejudice any estate, right, or interest of any other person in, to, or over the land.

. . . . .

133. (1) Any person desirous of showing cause against the issue of a certificate of title under sections 130 to 135 of this Act may, at any time within the period of five years from the date of the first publication of notice of the application for the issue thereof, petition the registrar, subject to the prescribed conditions as to security for costs and otherwise.

. . . . . .

134. (1) Within the prescribed time after the expiration of the period of five years from the date of the first publication of the notice

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of application for the issue of a certificate of title under sections 130 to 135 of this Act, the applicant may finally apply to the registrar to issue the certificate of title applied for.

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(5) If, by reason of the issue of a certificate of title under sections 130 to 135 of this Act, any person is deprived of any estate or right in, to, or over the land, or any money charged on the land, the person in whose name the certificate of title is issued, his executors and administrators, shall be liable to pay that person, his executors, administrators, or assigns, compensation for the same.

(6) If, on the receipt of the final application for the issue of a certificate of title under sections 130 to 135 of this Act, the registrar is satisfied that the certificate should only be issued subject to certain exceptions or reservations, or as respects part only of the land, the registrar shall issue the certificate of title either subject to those exceptions or reservations, as on first registration of a qualified title, or as respects that part only of the land.

(7) In the event of any change of ownership of the land during the period between the date of an application for the issue of a certificate of title under sections 130 to 135 of this Act and the issue of such certificate, the application shall not be deemed to have determined, but the person to whom a certificate has been issued as successor in title of the applicant may, if he thinks fit, proceed with the application as if he were the original applicant.

(8) All mortgages and incumbrances endorsed on the original certificate of title shall be endorsed on the certificate of title issued under sections 130 to 135 of this Act, and, subject to any entry to the contrary on such certificate, the issue of such certificate shall enure for the benefit of any such mortgagee or incumbrancee.

135. (1) Where a certificate of possessory title or qualified title has been issued, and any incumbrance or mortgage is endorsed thereon, the incumbrancee or mortgagee may, if he thinks fit, after notice to the person in whose name such certificate has been issued, apply to the registrar to have a certificate issued under sections 130 to 135 of this Act, and thereupon all the provisions of the said sections shall apply, as in the case of an application by a person in whose name the original certificate was issued.

(2) The costs of any proceeding under this section with respect to an incumbrance shall be added to the incumbrance.

PART IX. SPECIAL POWERS AND DUTIES OF REGISTRARS OF TITLES, AND MODE OF REVIEWING THEIR DECISIONS.

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PART X. POWERS OF ATTORNEY, ATTESTATION OF INSTRUMENTS, DEALINGS ABROAD, AND MARRIED WOMEN.

146. A power of attorney intended to authorize dealings with land, if executed within the colony, may be in form 2 in schedule B. If executed without the limits of the colony, it may be either in the said form, or in any form in use in the colony, country, kingdom, or place where the same bears to have been executed.

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147. All instruments relating to land executed within the colony, shall be attested by one witness, but it shall not be necessary to prove the execution of the instrument by any declaration or certificate of such witness. Wherever the registrar of titles shall have occasion to doubt the authenticity of any signature to any instrument, he shall make enquiry, and admit or refuse such instrument as he may deem proper, subject to the direction of the Court if his decision shall be challenged by the parties interested or any of them.

148. All instruments relating to land, executed without the colony, shall be proved by the declaration or certificate of the attesting witness before one of the official persons named in schedule C before whom instruments may be proved out of the colony, or they may be attested, without being proved, by such official person subscribing as a witness to the signature.

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151. Where any married woman executes or signs any instrument under this Act as concurring therein, it shall be necessary, if the instrument be executed out of the limits of the colony, that she appear before a judge or other officer qualified to take the acknowledgments of married women in the country, kingdom, or place where she may be, or before any of the official persons appointed for the purpose of proving or attesting instruments under this Act, who shall examine her apart from her husband, and take her acknowledgment that she signed the said instrument of her own free will, and that she did not act under any fear of, or compulsion from, her husband, and the person taking the acknowledgment shall sign a certificate thereof.

152. Where any instrument under this Act, or any deed or document relating to land, shall be executed by a married woman within the colony, or signed by her as consenting thereto, it shall not be necessary for the registrar to require any certificate of acknowledgment of the nature above set forth, but if he has any doubt of the genuineness of the signature, or has reason to believe that the instrument was not executed or signed freely and voluntarily, he may make such enquiries into the same as he may deem fit, and accept or reject the document presented or offered for presentation.

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168. In order that no lien or security may in any way affect land, except mortgages and incumbrances which are borne on the face of the certificate of title, no consignee of produce or other person who may provide supplies or advances to any land or estate shall, from and after the issue of a first certificate of title under this Act, as regards the land therein, or, as regards other land throughout the colony, from and after the 2nd day of August 1887, be entitled under any legal privilege called consignee's lien or otherwise, to have his claims against the land and estate paid by preference to other creditors, or to any mortgagee or incumbrancee, or, on the ground of any such privilege or lien, to sue out or apply for the sale of any land or estate, as an incumbrancee, but all persons, whether consignees of produce or otherwise, who may advance moneys or supplies to any land or estate, shall be left to recover the sums due for the same by ordinary process of law, or by obtaining such securities as are provided by this Act or otherwise known to the law; reserving always power to the Supreme Court, when a receiver has been appointed to any land or estate, to order and

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decree that such receiver shall, if he advances moneys or supplies to the land or estate, have a lien over the price thereof, when sold for payment of such advances and supplies, or to allow such preference or lien to a receiver appointed by the Court, if the circumstances shall call for it, although no such order or direction had been made beforehand.

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SCHEDULE A.

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Incumbrance.—All burdens, securities, or liens upon land, arising whether at law or in equity, other than mortgages, by which the land is subjected to particular interests in favour of individuals, or the revenues thereof are affected for the payment of annuities or temporary charges; and also any dealings with land which, in the event of sale, would limit the free use and disposal thereof by the purchaser, such as leases for three years and upwards; and all temporary attachments by judgments; and all caveats forbidding registration of dealings. An incumbrance is made, constituted, or created by a memorandum of incumbrance or memorandum of lease, the noting of a judgment or order, or the presentation of a caveat. The instruments must be presented to the registrar of titles, and must be noted by him on the certificate of title in the same manner as mortgages. Incumbrances (except caveats and judgments) may be transferred and discharged in the same manner as mortgages, and the transfers and discharges must be noted by the registrar of titles.

Incumbrancer.—The registered proprietor who makes, constitutes, or creates such burdens or liens upon land, or the revenues thereof, as above defined, and who executes the memorandum of incumbrance.

Incumbrancee.—The person in whose favour a memorandum of incumbrance is granted, and the incumbrance is noted on the certificate of title by the registrar of titles.

Indefeasible.—The word used to express that the certificate of title issued by the registrar of titles, and the notings by him thereon, cannot be challenged in any court of law on the ground that some person other than the person named therein as the registered proprietor, is the true owner of the land therein set forth, or on the ground that the mortgages or incumbrances in the notings thereon are not mortgages and incumbrances on the said land; except on the ground of fraud connected with the issue of such certificate of title, or the noting of such mortgages or incumbrances, or that the title of the registered proprietor had been superseded by a title acquired under the Real Property Limitation Act 1877, by the person making the challenge. The word also means that, the certificate of title being issued by the general Government of the colony, the general Government of the colony is,

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with the exceptions above mentioned, prepared to maintain the title in favour of the registered proprietor, leaving any one justly aggrieved by its issue to bring an action for money damages against the general Government of the colony.

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Land.—Land includes all the fixtures and buildings thereon, and everything growing on the soil (unless otherwise specified), with the exception of any wooden houses belonging to others on the land, which are accustomed to be moved from place to place, and any wooden houses the property of lessees, and, in towns or villages, with the exception of such movable wooden houses as are the property of the residents therein, and not of the owner of the soil.

. . . . . .

Owner.—The person having the legal right to land and the full *dominium* thereof, but who has not become the registered proprietor under this Act. This distinction is for the temporary purposes of this Act only, as the registered proprietor is in the fullest sense the absolute owner of the land.

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Transfer.—The consent of a registered proprietor to the sale or donation of the whole or part of the land contained in his certificate of title. The writing by which he signifies his consent is called a memorandum of transfer, and shall be in form 5 or 6 in schedule B. Transfers can also be made of mortgages and incumbrances, and of easements and incorporeal rights to be carried out by the execution of a memorandum of transfer. and the presentation of the same to the registrar of titles.

. . . . . .

Transmit.—The act by which land contained in any certificate of title passes to another proprietor by any other method than by transfer. Thus land transmits to the heir or representative of a deceased proprietor, the date of his death being the date to be inserted in the new certificate of title in favour of the heir, executor, administrator, or representative. The proprietorship of land transmits also to the trustee appointed by the Court under a bankruptcy.

Transmission.—The passing of the proprietorship of land in the manner above set forth.

. . . . .

SCHEDULE C. (s. 148).

Notaries public; commissioners appointed under the Commissioners for Oaths Act 1912, if empowered by their commissions to administer oaths for the purposes of this Act; commissioners for taking oaths and affidavits in the Supreme Court of Judicature in England and Ireland; the Lord Mayor, Lord Provost, mayor, provost, or chief magistrate of any city, town, or municipal corporation within Great Britain, Ireland, the colonies of the United Kingdom, or the United States of America; the Governor, or officer administering the

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Government, of any British colony or possession; any judge of any court of record of Great Britain, Ireland, the colonies and possessions of Great Britain, and the United States of America; and the ambassador, or officer performing the duties of that office, the consul, or consular officer performing the duties of consul, in any foreign country or possession, town or place, where such functionaries may be found.

All these may also witness the instrument, but if private parties have been the witnesses to the signatures, one at least of the witnesses must appear before one of the officers above named, and sign in his presence a certificate that he saw the party sign, and that the signature is of his proper handwriting.

Where an instrument signed out of the colony does not technically agree with the provisions of this schedule, the registrar of titles, to save vexatious and hurtful delays, may take the direction of a judge upon the point in conformity with the provisions of this Act.

. . . .

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BRITISH HONDURAS.

LAND TITLES REGISTRY ACT

(Consolidated Laws 1914, c. 179).

NOTE.—This statute is a chapter in the British Honduras Code as revised in 1914, and re-enacts the corresponding chapter in the Code of 1887. The latter is referred to in Aust. Torr. Syst. 20, 809. The principal parts of the statute itself and the schedules have been printed, the omitted sections and parts of sections being merely procedural.

. . . . . .

1. In the construction of this chapter (except when the context or other provisions require a different construction) the word "registrar" shall mean the registrar-general, who as keeper of the public records shall be registrar of titles to lands; the word "possession" shall include receipt of the rents and profits; the word "land" shall include houses, messuages, tenements and hereditaments, corporeal and incorporeal; the word "incumbrance" shall mean any legal or equitable mortgage in fee or for any less estate, and also any money secured or charged on land by trust or by judgment, decree or order of the Supreme Court, and also any legacy portion, lien or other charge, whereby a gross sum of money is secured to be paid, and also any annual or periodical charge which by the instrument creating the same or by any other instrument is made repurchaseable on payment of a gross sum of money, and also any arrear remaining unpaid of any annual or periodical charge, for payment of which arrear a sale of any land charged therewith might be decreed by the Supreme Court; and the terms "established" and "registered" shall also be taken severally to mean "sought to be established" and "sought to be registered."

3. Any person claiming to be entitled to any land in British Honduras may apply, by himself or his agent, according to the form given in schedule B to this chapter, to the registrar to register the title of the applicant to the said land; and the application shall be delivered or transmitted to the registrar at his office, to be filed.

4. The registrar shall prepare a notice of every application for publication in the gazette, and the London gazette, and shall supply the applicant or his agent with a certified copy of such notice, and the applicant shall cause a transcript thereof to be served on every owner of any land adjoining the land by him sought to be registered, and on any occupier of land included in such notice not holding under the said applicant nor being a mere trespasser.

5. . . such notice shall contain a statement that the title of such applicant will be publicly investigated by the chief justice, at a time and place in Belize to be appointed, not sooner than four months from the date of the notice, when all persons who shall have filed claims adverse thereto will be heard, and shall include all the particulars stated in the form given in schedule C to this chapter. . . .

. . . . . .

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7. . . in no case shall the chief justice pronounce in favour of any applicant who shall not establish to his satisfaction that he or they through whom he claims has or have had possession of the lands, or of the estate, interest, power, or right claimed therein (not being equitable only), for the then preceding twelve months.

8. Upon the investigation of any application or claim the chief justice shall take down in writing, in appropriate books, to be deposited with and kept by the registrar, the whole of the oral evidence, without any abridgment, which shall be adduced for and against such application or claim, and such books shall be open to inspection by any person whatsoever, subject to the payment of the authorized fees; but nothing herein contained shall be construed to authorize the inspection by any person whatsoever, other than the applicants and their privies of their evidence taken before the 29th day of June, 1865, in the investigations of applications.

. . . . . .

9. If on the investigation of any application the evidence, whether documentary, oral or otherwise, by the applicant or his agent in support thereof shall, notwithstanding the opposition (if any) thereto, in the judgment of the chief justice show that the applicant has a good primâ facie title to the land or some part thereof claimed by such applicant, the chief justice shall give under his hand a written decision describing the same, and the registrar shall forthwith enter the same in the register in manner in section 26 hereinafter mentioned, and file the written decision.

10. The chief justice shall accept as evidence of a primâ facie title for the purposes of this chapter such evidence of title as would, in the judgment of the chief justice, be accepted by a willing purchaser as sufficient evidence of a safe-holding title.

. . . . . .

14. Any person, other than the applicant, claiming any legal estate, interest, power, or right in or affecting land or any part thereof, in respect of which a primâ facie title has been established, may, by himself or his guardian, or next friend or committee, or his respective agent, as the case may be, at any time within ten years after the third publication in the gazette of the notice of the application to register the title to such land, deliver or transmit to the registrar at his office in writing, specifying the estate, interest, power, or right so claimed, and such evidence as he may think fit in support of his claim.

15. Where any person, other than the applicant, having or claiming any legal estate, interest, power, or right in or affecting land in respect of which a primâ facie title has been established, and referred to in the notice, does not within two years after the third publication of the notice, and whether or not resident in British Honduras, and whether or not under any disability, deliver or transmit, by himself or his guardian, or next friend or committee, or his respective agent, to the registrar notice according to this chapter of his claim, every such person so failing to give notice, and all persons claiming or to claim by, from, under or in trust for him shall, in favour of every person who shall at any time claim under or by virtue of any lease, transfer, or other partial or total alienation for valuable consideration, at any time made by the applicant, or by any person claiming by, from or under him, be, as regards the same land, absolutely barred from claiming at any time after those two years any legal estate, interest,

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power, or right (not being an equitable interest or right), of which notice might have been so given; and every estate, interest, power, or right the claim to which is so barred, shall in favour of every person so claiming in respect of alienation for valuable consideration be, as regards the same land, absolutely extinguished and null and void to all intents and purposes; provided nevertheless that any person lawfully entitled in preference to the said applicant to any estate, interest, power, or right which shall have been so barred as aforesaid, may at any time within ten years after the third publication of the notice aforesaid, recover from the said applicant, his heirs, executors and assigns the value of such estate, interest, power or right, at the time when the same was so alienated as aforesaid, or such greater sum as may, in the opinion of the Supreme Court, be equivalent to the injury which he has sustained by the barring of such estate, interest, power or right.

16. Where any person, other than the applicant, having or claiming any legal estate, interest, power, or right in or affecting the lands or houses, in respect of which a primâ facie title has been established and referred to in the notice, does not within ten years after the third publication of the notice, and whether [&c., s. 15, *supra*] shall, in favour of the applicant, and every person who shall at any time claim, whether for valuable consideration or not, by, from, or under him be, as regards the same lands or houses, absolutely barred from claiming at any time after those ten years any legal estate, interest, power, or right (not being an equitable interest or right), of which notice might have been so given; and every estate, interest, power or right, the claim to which is so barred, shall, in favour of the applicant and every person so claiming by, from or under him he, as regards the same lands or houses, absolutely extinguished and null and void to all intents and purposes.

. . . . . .

24. It shall be lawful for either the applicant or the claimant to appeal from the decision of the chief justice to his Majesty in council according to the provisions of chapter 16.

. . . . . .

26. Forthwith after the chief justice's decision on the claim of the applicant or his agent, the registrar shall enter in the register the name and description of the applicant, and a copy of the description of the lands given in the decision of the chief justice, and a copy of so much of the plan (if any) accompanying the application as comprises the land in respect of which primâ facie title has been established, and the estate, interest, power, or right in or affecting land which the applicant claims.

27. Where the two years, or, as the case may be, the ten years, within which notice of the claim of any estate, interest, power or right in or affecting the land, or any part thereof, may according to this chapter be made, elapses without such claim being made, the registrar shall, on the expiration of the respective period, make in the register an entry of the period having elapsed without such claim being made.

. . . . . .

30. The person or persons, who according to the entries made according to this chapter in the register appear to be entitled, accord-

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ing to this chapter, to land, or to any legal estate, interest, power or right in or affecting land, shall be entitled accordingly, and to the exclusion of all other persons, and of all other estates, interests, powers and rights, not being equitable estates or interests, in or affecting the said land, or any part thereof; and the register, or any extract therefrom, duly certified by the registrar, shall be to all intents and purposes whatsoever, and to the exclusion of all other evidence (evidence of fraud only excepted), the foundation and the evidence of the foundation of the title to the land registered, and to the estates, interests, powers, and rights registered; and the registered land, estates, interests, powers, and rights respectively may and shall descend, devolve and be transmitted, dealt with, disposed of, and enjoyed accordingly: provided notwithstanding that in regard to all titles to lands, founded upon previous grants from the Crown, all the reservations, provisos, and conditions contained in those grants shall be preserved.

31. A transfer, entered in the register, of land shall be a sufficient conveyance, and no other mode of assurance shall be necessary; and the certificate of the registrar, under his hand and seal, shall be a sufficient evidence of such transfer; and such certificate may be dealt with and used as any title deeds, conveyances, or assurances may be dealt with and used.

32. When the estate or interest of a registered proprietor is transmitted on his death to any other person by descent, will or representation, such other person shall, on the production before the registrar of proof satisfactory to him, be entitled to be entered on the register in the place of the deceased applicant, claimant or proprietor, as the case may be, and if such person cannot be ascertained, or there shall be any doubt, dispute, or litigation touching the ownership of the estate of such deceased proprietor, it shall be lawful for the Supreme Court to appoint a person to be registered in the room of such deceased proprietor as the representative of such estate or interest.

. . . . .

36. Memorials of descents, deaths, marriages, and the evidence thereof respectively, and such other memorials and evidence of matters relating to registered lands as the registrar shall, on the same being delivered to him, deem important, shall be registered.

37. Where any married woman is desirous of making any application, giving any consent or doing any act, or becoming party to any proceeding under this chapter, her husband's concurrence shall be required, and she shall be examined apart from her husband touching her knowledge of the nature and effect of the application or other act, and it shall be ascertained that she is acting freely and voluntarily; and such examination may be taken before the chief justice, or a commissioner appointed by him to take acknowledgments of married women; and any married woman entitled to her separate use, and not restrained from anticipation, shall, for the purposes of this chapter, be deemed a feme sole.

. . . . . .

40. All equitable estates and interests shall be governed, regulated and secured according to the rules contained in schedule D to this chapter.

. . . . . .

45. This chapter shall not prejudice, affect or extend to any estate, interest, power, right, franchise, jurisdiction or royalty of his Majesty, his heirs or successors.

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SCHEDULE A. (BOOKS).

1. There shall be one book in which all applications to be registered as owners of lands shall be entered as soon as the application shall be made.

. . . .

7. Lastly, there shall be a book, in which all titles to land shall be registered when such titles shall have become in any respect absolute and indefeasible, either from the parties having failed to put in claims within the two years, limited by this chapter, or from the decision of the chief justice or the judgment of the Judicial Committee of the Privy Council, or otherwise.

8. There shall be a caveat book (*see* schedule D).

9. There shall be a record book to meet the requirements of section 36.

. . .

SCHEDULE D. (CAVEATS AND EQUITABLE INTERESTS, &C.

1. Any person, claiming under any written instrument any unregistered estate or interest affecting, or equitable lien upon, any registered land, shall be entitled to lodge a caveat with the registrar.

2. The caveat shall be lodged, either for the exclusive protection of the person claiming to be entitled to any unregistered estate or interest or equitable lien, or for the protection of all persons claiming or to claim under any written instrument.

3. Claimants under judgments, decrees, and lis pendens, shall be protected by caveat.

. . . . . .

6. When a caveat shall have been lodged with the registrar the lands to which it relates shall not be transferred until it be removed. Notice of the lodging of the caveat shall be given to the registered owner or his agent.

7. When a registered owner of land, with respect to which a caveat has been lodged, applies to the registrar to transfer such lands to a purchaser, the registrar shall give notice to the person lodging such caveat or his agent of such application; and if, on the expiration of fourteen days after he has received such notice, he shall take no steps to protect the interest to which the caveat relates, the caveat shall be removed.

. . . . . .

10. If the caveat shall be improperly removed through the carelessness or fraud of the registrar, the registrar shall be liable to an action for damages on the part of the person by or for whom it is lodged, or his heirs, executors or administrators, as the case may be.

. . . . . .

12. When application is made to the registrar to transfer registered lands to a purchaser, and there is no caveat lodged, or if lodged, such caveat has been removed, the registrar may make such transfer, although in point of fact the said lands may be incumbered, and an alienee for valuable consideration to whom the said lands are transferred shall take the said lands free from all incumbrances, whether such alienee have notice thereof or not.

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